THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, DECEMBER 10, 1875. { Hon. JOHN F. DILLON Contributing Editor.

RIPARIAN RIGHTS.—Among the interesting decisions which we publish in this number, we ougth not to omit to mention that of the Supreme Court of Missouri, in Benson *et al* v. Morrow *et al.* We like the opinions of Mr. Justice Napton, who delivered the opinion in this case. In addition to the fact that his reasoning is generally technically sound, he contrives to import a great deal of good sense into his opinions. His repudiation in this case of the distinction between alluvion formed by "avulsion" and that formed by gradual accretion, may be cited as an instance of this. The case before him only required him to say that such a distiction is inapplicable to the changes produced by such a stream as the Missouri river. We may, perhaps, go further and express the conviction that it is inapplicable to any other stream. Really, the formation of alluvion by "avulsion" reminds one too much of the land slide in Mark Twain's book, where one man's ranch slid down the mountain and covered up another's, the avulsionist all the while sitting on his gate-post, waving his hat at his unfortunate neighbor.

TIME DRAFTS ACCOMPANIED BY BILL OF LADING—DUTY OF AGENT FOR COLLECTION. — The case of The National Bank of Commerce of Boston v. The Merchants' Bank of Memphis, which we publish elsewhere, will prove of especial interest to the mercantile community. The court holds that where a time draft, accompanied by a bill of lading of cotton which had been shipped to order, had been discounted by a bank in Memphis and forwarded to a bank in Boston "for collection" simply, and without any specific instruction, it was the duty of the collecting bank, upon the drawee accepting the draft, to deliver to him the bill of lading, and in case of the draft not having been paid at maturity, the collecting bank was not responsible. Mr. Justice Strong, who delivered the opinion, enforces the view taken by the court by a great cumulation of reasoning; and, after an attentive examination of the authorities, feels justified in saying that "no respectable case can be found in which it has been decided that when a time draft has been drawn against a consignment to order, and has been forwarded to an agent for collection with the bill of lading attached, without any further instructions, the agent is not justified in delivering over the bill of lading on the acceptance of the draft." The learned judge reasons that it is a necessary implication from a time draft, accompanied by a bill of lading endorsed in blank, that the merchandise specified in the bill was sold on credit, to be paid for by the accepted draft, or that the draft is a demand for an advance on the shipment, or that the transaction is a consignment to be sold by the drawee on account of the shipper. If it is a sale on credit, it resembles a case where the purchaser has given his note for the goods sold; in which case he is clearly entitled to the possession of the goods, in the absence of an express stipulation to the contrary. Or, if it is a request for advances on the faith of the consignment, this plainly indicates that the credit is to be given on the security of having possession of the goods, and not on the credit of the drawer. In either event the agent will not be justified in withholding possession of the bill of lading. These and the other reasons put forth by the learned justice, seem to be absolutely conclusive, and appear to leave no ground whatever on which to rest a contrary conclusion; and we are only surprised at the length at which he has dwelt upon a question, the solution of which would appear so obvious. The case derives special importance from the fact that this is the first time the question has been passed upon by the federal court of last resort; and, it being a question which, in a large number of cases, may arise in inter-state commercial transactions, the state courts will no doubt be governed by it, although not necessarily so.

THE BAR OF NEW MEXICO.—We have received from a trustworthy correspondent at Trinidad, Colorado, a letter complaining severely of the action of the District Court of Colfax County, New Mexico, in refusing to permit counsel from Colorado to appear in that court in defence of persons there indicted for crime. Our correspondent states that at the last March term of that court, John R. Thacher and twenty others were indicted for conspiring to kill. They all employed Messrs. Dunton & Hanley, attorneys at Trinidad, Colorado, to defend them, and these gentlemen engaged the services of Frank Springer, Esq., as local attorney, to assist them. At the August term Mr. Springer moved the court for leave to enter the appearance of Dunton and Hanley for defendants. This motion was made in pursuance of a statute which provides that "In all criminal prosecutions the accused shall enjoy the right to be heard by himself, or counsel, *or any other person* who may defend him." Laws of N. Mex., p. 316, § 7. The territorial declaration of rights also declares that "In all criminal prosecutions the accused shall have the right to be heard by himself or counsel." P. 640, § 8. And still another statute provides, "That every man be free to defend himself, by himself, *or by any other person*, in any court of this territory." P. 642. The only legal restriction upon the right of any person to defend one charged with crime, is that the defence shall not be conducted by a thief, man of bad faith, or by one convicted of public crime. The usual qualification of being an attorney is not imposed. This we understand to be the law of New Mexico, which stands upon her statute books unrepealed. Notwithstanding the above provisions, giving the defendants the undoubted right to employ non-resident counsel if they should choose to do so, our correspondent states that the motion was strenuously opposed by some of the resident attorneys, including Mr. Waldo and Mr. Catron, of Santa Fe. Our correspondent states that the ground of Mr. Waldo's opposition to the motion, was that a rule of the *Supreme Court* of New Mexico prohibited other than resident-attorneys from practicing in *that court.* Such a rule, if in existence, would clearly be in conflict with the provisions of the bill of rights above quoted, and therefore void; but if valid, it would have no application to the district courts. His honor, Judge Palm, after hearing full argument, refused to admit Messrs. Dunton and

Hanley, stating that he would like to do so, but could not, in opposition to the wishes of the bar of New Mexico.

These are the facts as detailed to us. If erroneous in any particular, we should be glad to correct them. If they are true, we do not see on what grounds of law or of legal ethics the conduct of the resident counsel or the decision of the court can be justified. The decision appears in the very teeth of the provision of the territorial bill of rights above quoted, and, we should suppose, would make any subsequent proceedings in the case erroneous. So far as we know, it is contrary to the universal practice which obtains in the state courts. If such a practice has obtained in the courts of any of the states, we should be glad if any of our readers would inform us of it.

Mastin v. Halley.

Among the interesting decisions of the Supreme Court of Missouri, delivered at the term which has just adjourned, is that of Mastin v. Halley, which we publish elsewhere. Mr. Justice Sherwood, who delivered the opinion in this case, has, since he has been on the supreme bench, given much attention to questions of equitable cognizance, and his reasoning is therefore entitled to respectful consideration. Nevertheless, after an attentive perusal of this case, we can not bring our minds to a feeling of satisfaction at the result. Here is a case where a man appears to have paid $4,800 for certain property; but because of a technical mistake in a conveyance made many years before, when it was of little value, he is, as we understand the result of the case, deprived of it, and it goes to one of the heirs of the grantor in whose deed this mistake occurred, and to a purchaser from the other heir, who does not even appear to have paid a valuable consideration. This may be *equity*, but we can not bring ourselves to believe that it is *justice*. If it is equity, then we are led to the reflection that equity has become, like the common law, against whose operation it was intended to relieve, a series of unbending and technical rules, which frequently result in the doing of injustice, or, what is the same, as in this case, the denial of justice. The only argument of the learned judge which strikes us as possessing force, is that the plaintiff had failed to allege the performance of the covenant to build on the part of himself or of those through whom he claimed, and hence, under the operation of the maxim that "he that seeks equity must do equity," had no standing in court. The reasoning of the learned judge, as we understand it, is, that the plaintiff had not brought himself within the maxim that he that seeks equity must do equity, because he had not performed the covenant to build "one certain building" upon the lots; but as this covenant was of so uncertain a nature that the court could not direct its performance, therefore he should not have relief. This, it seem to us, is equivalent to saying, "You shall not have relief, because you have not done what you can not do." But would it not have been easier to suppose that a covenant which may have been of little benefit to the original grantor, and the failure to perform which may have wrought him no injury, had, after the lapse of so long a time been commuted or waived by those entitled to insist on its performance? At least, it would seem that it would have been easier to suppose that the "temporary shanty" put upon the lots in 1872 fulfilled the vague and uncertain covenant to erect "one certain building," especially since the court was left wholly to conjecture as to the object of the covenant. If, as the learned judge states, the covenant was so vague that it could not be specifically enforced in equity, how can a court of equity say that the erection of this structure was not a fulfillment of it? We can not but believe that good technical reasons might have been found to warrant the granting of the relief sought. For instance, there is a maxim that equity regards that as having been done which ought to have been done. When Hubbard made this deed, he ought to have affixed a seal to it, and doubtless omitted to do so through a common mistake. A court of equity, then, would treat the case as though the deed had been ensealed as well as signed. Why not? What is a seal? It is an invention of a rude and barbarous age when men could not write their names. With us it is, in point of fact, a naked and senseless formality—a mere scrawl of the pen—a thing which any one can counterfeit without detection. Whatever may be its cabalistic meaning in point of law, it imports no verity as a matter of fact. The signature, and never the seal, is looked to to determine the genuineness of the instrument. It may be made by any one before the deed is delivered. 3 Washb. Real Prop. 245, 3d Ed. The use of this scratch of the pen—when it is to be resorted to and when omitted—is a thing which very few business men understand; and nothing is more common than to find it employed where it ought not to be employed, and omitted where it ought not to be omitted. It seems scarcely tolerable, then, that important rights should be prejudiced, especially after many years, and when the property in question has doubled many times in value, because of the omission, by mistake, of a formality which, in point of fact (whatever it may be in point of law), is so utterly useless?

Aside from these considerations of private right, it may be useful to enquire how far the free alienation of land is to be fettered by covenants to build, the performance of which is not insisted upon by the covenantee or his successors? Do these covenants run with the land, and if so, how long are they to be deemed to be in force, rendering titles insecure?

Railway Negligence—Remote Fires.

Dr. Wharton has contributed a most philosophical and instructive paper to the forthcoming (January) number of the Southern Law Review, on the liability of railway companies for injuries happening through the spread of fires originally ignited by sparks from their engines; in which he takes occasion to discuss the question more fully than he did in his work on Negligence. He supposes the case of a squatter who builds a shanty three hundred feet from a railway track, and leaves a mass of combustible materials to collect between it and the track. These combustibles are ignited by sparks from a passing locomotive, and the shanty is soon in flames. The same carelessness which left a lane of combustible materials from the railroad to the shanty, leaves a further lane of combustible materials to other buildings, constructed with equal recklessness a little further on. Over this continuous line the fire races rapidly, and by this process the suburbs of a city take fire, and the city itself is destroyed. Is the railroad to be confiscated to pay the resulting damages?

In the discussion of this question, Dr. Wharton enters upon

a profound examination of the doctrine of causation; unfolds to the reader, with humorous illustrations, the epicurean doctrine that the cause of an event is the sum of all its antecedents, if, indeed, we can conceive of an aggregation of things infinite in number. He shows that the law can not deal with all these antecedents, but only with that one whose active agency or passive negligence immediately produced the injury; and that one of the agents antecedent to a catastrophe can not be held responsible, where the casual connection has been broken by the intervention of an independent responsible agent. In other words, "*cause*, in its juridicial relations, *is such an interposition, by a responsible human agent, as changes the ordinary sequence of physical laws, and produces, by its immediate and regular efficiency, the result under investigation.*"

Dr. Wharton's observations derive point from the fact that some of our modern decisions pass over the immediate responsible cause, if it is a person not *pecuniarily* responsible, and travel back through the successive antecedents until one is found who is rich, and plunder him, not because he ought to pay damages, but because he can pay them. See, for instance, Fent v. R. Co., 59 Ill. 351; Atchison R. Co. v. Stanford, 12 Kans. 354.

Whilst we can not but admire the fine vein of satire which, mingled with forcible arguments, runs through the following paragraph, it must be confessed that argument and satire are not the only weapons which the friendless rich are able to oppose against the hungry strength of the poor:—

"But, if our range of selection among antecedents is unlimited, why stop at the railroad company? The railroad company may be in fact poor. If put up for sale under a judgment, its value may be but a song; and besides this, it might be worth while to consider whether a jury might not, even for a railroad company, feel some sympathy. For after all, it will not be merely the 'bloated bondholder' who will suffer if the railroad is ruined. Thousands of operatives are mediately or immediately employed in running it, and in keeping it in repair. To its conveniences of transportation all the farmers bordering on it owe a market in which to buy and in which to sell. Even the wood-cutter who has virtually carried the coals dropped by its locomotives, and by them set fire to the neighboring town,—even this laborer has an interest in the property of the road, for if the road is killed out, what becomes of the work by which his living has been made? Even the neighboring town, thus set fire to, is interested; for as the road made it, so with the road it may die. So a jury might argue; and if we are entitled to skip any antecedent we choose, why not skip the railroad company, and attack any antecedent still less likely to find friends,—the rich capitalist, for instance, who contributed to build the road, or the rich manufacturer by whom its locomotives were constructed? Ought not the capitalist, before he lent his money, to have seen to it that his money should be prudently employed, and ought he not to be treated as accessory to damages which would not have occurred but through him? And ought not the manufacturer have refused to furnish locomotives without impervious spark fenders, and was not his negligence in this respect one of the most conspicuous conditions of the burning of the town? Why, then, not sue the rich man who lent the money, or the rich man who built the locomotives? Or, if not these, why not go back still further, until we light upon some other antecedent, still more wealthy and friendless, by whom the losses we have sustained may be made up?"

Dr. Wharton cites, as sustaining his general views, the following cases: Hooley v. Felton, 11 C. B. N. S. 142; Mangan v. Atherton, L. R. 1 Exch. 239; R. v. Ledger, 2 F. & F. 857; Sharp v. Powell, L. R., 7 C. P. 253; Saxton v. Bacon, 31 Vt. 540; Stevens v. Hartwell, 11 Metc. 542; Shepherd v. Chelsea, 4 Allen, 113; Richards v. Enfield, 13 Gray, 344; Perley v. R. R., 98 Mass. 414; Crain v. Petrie, 6 Hill, N. Y. 522; Ryan v. R. R. 35 N. Y. 210; Webb v. R. R., 49 N. Y. 425; S. C., 3 Lans. 453; Hofnagle v. R. R. 55 N. Y. 608; Penn. R. R. v. Kerr, 62 Penn. St. 353; Cuff v. R. R, 35 N. J. 17; State v. Rankin, 3 So. Car. 438.

Equitable Relief against Mistakes in Conveyances—Conveyances with Covenants to Build—Specific Performance.

MASTIN v. HALLY *ET AL.*

Supreme Court of Missouri, November, 1875.

Present, Hon. DAVID WAGNER,
" WM. B. NAPTON,
" H. M. VORIES,
" T. A. SHERWOOD,
} Judges.

1. **Conveyance—Defective Acknowledgment—Who may take Advantage of**—None but purchasers *for valuable consideration* will be heard to urge the insufficiency of the certificate of acknowledgment appended to a previously executed deed of conveyance. [Acc. Bishop v. Schneider, 46 Mo. 472, and cases cited.]

2. **Mistake in Deed of Conveyance—Failure to affix a Seal—Relief in Equity**—Where a deed conveying land has been made, perfect in all its parts except a seal, and it appears that the seal has been omitted by mistake, a court of equity will grant relief to the grantee, or those claiming through him, against the heirs of the grantor, or subsequent purchasers from him, by divesting the legal title out of such heirs and subsequent purchasers and vesting it in the complainants; and this is especially so where it appears that such subsequent purchasers are not purchasers for a valuable consideration.

3. **Specific Performance.**—A contract whose specific performance is sought in a court of equity must be certain, mutual and capable of being performed. A covenant in a deed of conveyance that the grantee will "erect or cause to be erected one certain building on the lots," is not such a contract.

4. **Case in Judgment.**—In 1855 Chester Hubbard conveyed to Asa Lawton two lots in Kansas City for $200, and in further consideration of the agreement of the grantee "to erect or cause to be erected one certain building on the lots." This deed was formal except that it lacked a seal." Lawton conveyed to one Coates in consideration of $250 and a similar covenant to erect a building. By subsequent conveyances the property came into the hands of the plaintiff for the aggregate sum of $4,800. Hubbard, the original grantor, died, leaving two heirs. One of them conveyed the undivided half of his interest in the property to the defendant, Halley. There was no evidence that this conveyance was made for valuable consideration. The other heir is made defendant to this suit. "A small temporary shanty" had been erected on the premises since the commencement of this suit. The plaintiff alleged that the omission of a seal in the original conveyance was a mistake, and prayed that the legal title be divested out of the defendants and vested in himself. *Held*, that this is in effect a suit for specific performance, and that relief can not be granted, (1), because the covenant to build in the original deed was vague and indefinite, and the contract was hence lacking its certainty and mutuality; (2), because the plaintiff did not allege the performance of this vague and indefinite contract on his part, and was therefore subject to the maxim that "he who seeks equity must do equity;" and (3), because, owing to the greatly enhanced value of the propery, the time has probably passed by when the performance of the covenant to build would secure the benefits which the first grantor intended.

Error to the Circuit Court of Jackson county.

F. M. Black, for defendant in error; *J. T. Campbell, Gage & Ladd*, for plaintiff in error.

SHERWOOD, J., delivered the opinion of the court.

In 1855, one Chester Hubbard, being the owner of lots 6 and 7, in block No. 2, of Hubbard's addition to the town of Kansas (now Kansas City), in consideration of the sum of $200, the receipt of which was acknowledged, "and in consideration of the agreement of the said party of the second part (one Asa Lawton) to

erect or cause to be erected one certain building on the lots," conveyed them to Lawton by an instrument which, but for its lack of a seal, would have been a deed with the usual covenants of warranty and perfect in all its parts. Within five months from the date of this imperfect instrument, Lawton, by a similar instrument, with the exception that it was in all respects a complete deed, conveyed the same lots to one Kersey Coates, The consideration expressed in the last named instrument to have been received was $250, together with the further consideration recited in terms almost identical with those employed as above mentioned and absolutely the same in effect. Hubbard signed his name by an attesting witness to this deed. In 1861 Hubbard died. In the following year Coates conveyed the undivided one half of the lots to Mordicia Lawrence, and the residue to John Simmons, who, subsequently dying, Coates, as the executor of his last will, conveyed the portion of his testator in the lots to the plaintiff in June, 1868, for the sum of $3,800, and on the same day Lawrence conveyed his share of the premises to the plaintiff for $1,500. Hubbard left at his death two heirs, one of whom, a minor, is a defendant in this suit. The other heir, J. Reuben Hubbard, in 1870 conveyed to defendant (Halley) the undivided one-half of the lots in suit. Possession of the premises was never taken by Lawton, nor by those claiming under him, nor did he or they erect a building of any description on the lots. "A small temporary shanty" was put up in the year 1872, but by whom does not appear.

This proceeding was instituted in 1871 for the purpose of divesting the legal title out of the defendants and vesting it in plaintiff, on the ground of mistake made by Hubbard in failing to affix a seal to the conveyance to Lawton, and that Haley bought with full notice of the mistake, and with the desire to cheat and defraud plaintiff, with whose rights he was well acquainted at the time of his purchase. The chief allegations of the petition as to notice, etc., were denied in the answer of the defendant (Halley), and the usual answer made by the guardian *ad litem* of the minor heir.

1. As it was shown at the trial that Halley was a purchaser for a valuable consideration, it is needless to disclose the sufficiency of the certificate of acknowledgement appended to the instrument executed by Hubbard to Lawton, for only those standing in the attitude of purchasers for value can take advantage of defects of the nature alluded to. Bishop v. Schneider, 46 Mo. 472, and cases cited.

2. The doctrine that courts of equity will interpose for the relief of a vendee who has taken a defective conveyance, and will compel the vendor and his heirs, and all other persons claiming under him by the act of the law, although without notice, and even persons claiming as purchasers for valuable consideration, if with notice, to make good the conveyance, is one which has found in those courts frequent recognition and been illustrated by a long line of decisions far too numerous for citation. 2 Sugden on Ven. p. 1022; Wadsworth v. Wendell, 5 Johnson's Ch. 224, and cases cited.

In the case last cited the defective conveyance was imperfect in the precise particular that the one before us is, *i. e.*, it only lacked a seal, and Chancellor Kent held that as the instrument was in form a deed with the single exception that it lacked a seal, and that it concluded with the words "In witness whereof I have hereunto set my hand and seal," that the intention to affix the seal was apparent, and the omission to do so a mere mistake, concerning which redress could be afforded. And it was accordingly decreed in that case that the subsequent purchasers, with notice, should convey the legal title to the first purchaser. And were the matter of mistake and its correction by any appropriate decree which would accomplish the desired object and procure the relief sought, the *single* element in the case at bar no hesitation could be felt while complying with the plaintiff's prayer, since it will be readily seen that the defendants are not in position to resist successfully a decree based alone upon the above stated grounds. There are, however, other ingredients in this case which must exert a controlling influence in the endeavor to arrive at a correct conclusion, and we will briefly advert to discuss them.

3. It is obvious from previous statements that the plaintiff, as his title at best is but an equitable one, in effect, although not praying for it in direct terms, seeks a decree for specific performance; this being the case he will be held answerable to those rules which govern when relief of that character is asked. Among those rules are:

That the contract whose specific enforcement is sought should be *certain, mutual and capable of being performed*. Sto. Eq. Jur., Sec's. 723, 736, 751; Fry Spef. Perf., p. 133.

And the certainty requisite in a contract which is the subject of adjudication in a court of equity is necessarily greater than if in a suit at law damages were demanded for its breach; for in the latter forum it is in general sufficient to a recovery to establish the negative proposition of non-performance, while in a court of equity it is an indispensible requisite that the contract should possess terms of such reasonable certainty as to enable that court, by having regard to the subject-matter and attendant circumstances of the contract, to determine the force and effect of the terms employed, in order to decree their specific execution. Now, it is obviously impossible to comprehend the meaning of the agreement incorporated in the deed from Hubbard to Lawton, and in the deed of the latter to Coates. "A certain building" is to be erected upon the lots, but the dimensions, quality and material thereof are altogether conjectural. Nor is that contract *mutual*, namely, it is not such as might at the time of its formation have been enforced by either of the contracting parties against the others. And it is entirely immaterial what constitutes this lack of mutuality, whether resulting from personal incapacity, the nature of the contract, or any other cause; whenever the absence of this essential element is ascertained to exist on the part of one party, and for that reason is incapable of being enforced against him, that party is equally incapable of enforcing the contract against the other, although no difficulty should attend its execution in the latter way. And this is plainly the state of the case here. Though Lawton or Coates would have had no obstacle in their way as to the part Hubbard was to perform, yet he on his part could never have obtained against either of them the equitable relief of specific execution, by reason of the terms of agreement on their part. The doctrine here asserted is as thoroughly setteled as any in equity jurisprudence. Fry Spef. Perf. 133, and cases cited.

4. But the contract before us could not be enforced for another very sufficient reason: A court of equity will not enforce "*building contracts*" because it is said, "If one will not build another may." And although in the earlier cases a different view obtained, yet in the latter one this doctrine is expressly denied, Sto. Eq. Jur., Secs. 725, 726. And though Mr. Justice Story does not yield assent to what he admits is the current of modern adjudication, and offers much ingenious reasoning in support of his views, still even he insists that the contract to build should possess "sufficient definiteness and certainty." Ib., Sec. 728. And Lord Rosslyn, whose views meet Judge Story's cordial approbation, held that where "the contract to build or rebuild had a definite certainty as to *size, material*, etc., it ought to be decreed in equity to be specifically performed. But if it was *loose, general or uncertain*, then it ought to be left to a suit for damages at law." Mosley v. Virgin, 3 Ves. Jr., 185. But since, as already seen, the present contract is of such a vague and indefinite nature, it is a matter of no moment, so far as the case at bar is concerned, whether we adhere to the earlier or later authorities; in either event specific enforcement must be denied, and our refusal in this regard will, for the reasons stated, amply support both in the elder as well as in the more recent adjudications.

5. If, however, the agreement under consideration lacked none

of the essential requisitions we have mentioned, still an insuperable barrier to the relief sought is found in the fact that no compliance with the terms of the agreement, loose and general as they are, is urged or even alleged on the part of the plaintiff. And there is not a single palliating circumstance to extenuate the conduct of the plaintiff in thus entering a court of equity, and without showing the slightest performance on his part to entitle him to equitable relief, asking the active interference of that court in his behalf, while disregarding and trampling upon the maxim that "he who seeks equity must do equity." And the argument which might be urged, that but for the mistake made the plaintiff would now be the possessor of the legal title to the premises in suit, is without force, as in consequence of that mistake he is in precisely the same situation as if the assignee of a title-bond, and must therefore come under the rigid application of that maxim whose teachings he, and those under whom he claims, have so persistently ignored.

6. The evidence in this case is extremely meager, but if we are to be guided by inference, it may perhaps be not unfairly assumed that the contract between Hubbard and Lawton was entered into by the former with the view of enhancing the value and attractiveness of his adjacent property, by causing the erection of a building on the lots sold. If this assumption be correct, owing to the great change in the circumstances attendant on the formation of the contract and the greatly enhanced value of the lots in question, the time has long since passed in which the benefits intended by Hubbard to be derived from a building on the lots can now be realized.

The judgment is reversed and the cause remanded.

Judge Hough not sitting; the other judges concur.

Removal of Causes—Act of 1875—Time when a Cause may be removed.

ANDREWS' EXECUTORS v. GARRETT.

United States Circuit Court, Southern District of Ohio, November, 1875.

Before Hon. PHILLIP B. SWING, District Judge.

Under the third section of the act of 1875, a cause which was pending at the time of the passage of the act, is removable from a state court to the federal court, if the petition and bond are filed "at or before the first term at which said cause could be first tried," *after the passage of the act.* So held, when the cause had been tried, and a new trial awarded before the passage of the act.

On the 25th day of March, A. D. 1867, suit was brought by the plaintiffs against the defendants in the Court of Common Pleas of Muskingum County, Ohio, to recover the sum of $10,000 deposited with the defendants by the plaintiffs as indemnity for acceptance by them for the accommodation of the Stubenville and Indiana Railroad Company, and which, by reason of certain facts set forth in the petition, the plaintiffs claim the defendants became liable to pay to them. Attachments were issued upon this petition and certain property was attached.

On the 18th day of May, 1867, the defendants filed the motion to remove the cause into the Circuit Court of the United States, on the grounds that the defendants were citizens and residents of the state of Maryland, and that the plaintiffs were citizens and residents of Ohio. Upon the hearing of the motion it appeared that one of the plaintiffs was a citizen and resident of Illinois, and one a citizen and resident of Minnesota. The motion was overruled. Thereupon the parties proceeded to make up the issues in said court of common pleas, and at the April term, 1873, a jury was waived and the case submitted to the court and judgment rendered in favor of the defendants. At the same term the plaintiffs were awarded a second trial under the statute, amendments were made to the pleadings, and the cause was continued from term to term, until the November term, 1874, when a trial was had before a jury, and a verdict was rendered for the plaintiffs. At the same term the verdict was set aside and the cause was continued till the January term, 1875. On the 25th of January the cause was continued. At the same term, to-wit, April 25, 1875, the order of continuance was set aside, and on the same day a petition was filed by the defendants praying for a removal of the cause to the Circuit Court of the United States. under the provisions of the act of Congress of March, 3, 1875. Bond with proper security was also filed. The grounds of removal were that the defendants were citizens and residents of the state of Maryland, and that one of the plaintiffs was a resident of the state of Illinois, one a citizen and resident of Minnesota, and the other a citizen and resident of Ohio. This application was resisted upon the ground that the case did not come within the provision, of the act of March 3, 1875, because not filed with the court at or before the first term at which the cause could be tried, and before the trial thereof. Upon the hearing of this petition, the court, for the reason that the action was triable, and was actually tried in said court before the passage of the act of Congress, overruled said motion. Afterward, on the 12th day of May, 1874, the defendants filed in this court transcripts of the record and proceeding in said cause. And afterward, on the 6th day of October, a motion was filed to strike the case from the docket, on the ground of the want of the jurisdiction in this court.

Judge *Granger*, of Muskingum county, and *E. F. Hunter*, Esq., of Lancaster, argued by briefs in favor of the motion, and Senator *Thurman* replied orally.

By the court, SWING, J.—The disposition of this motion involves the construction of the second and third section of the act of Congress, pased March 3, 1875, providing, etc. The second suit of a section of that act provides, "That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and arising under the constitution or law of the United States. * * * Or in which there shall be a controversy between citizens of different states, etc., either party may remove said suit into the Circuit Court of the United States for the proper district. And when in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs as defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

The third section provides "That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceeding section, shall desire to remove such suit from a state court to the Circuit Court of the United States, he or they may make and file a petition in such suit in such state court before or at the term at which said case could be tried, and before the trial thereof."

The remaining part of the section refers to the bond and proceedings on removal.

It is not denied that the amount involved in this case, and the citizenship of the parties, were within the requirements of the second section. The amount was over five hundred dollars. The controversy was between citizens of different states, and the suit was pending in a state court at the time of the passage of the act of Congress, possessing every element to authorize its removal to the Circuit Court of the United States.

The third section simply provided the *time when* and the mode in which the application shall be made for such removal, and the steps necessary to accomplish it. The mode is to be by petition to the state court, and the time is before or at the term at which said cause could be first tried, and before the trial thereof.

The facts found by the learned judge of the state court show that the petition was properly filed, and all the necessary steps taken in accordance with the provisions of the 3d section, and that the petition was filed before or at the term at which said cause could

be tried, after the passage of said act of Congress. And if the term referred to be the term after the passage of the act, there can be no controversy in the case. The jurisdiction must be admitted. That Congress had the power to authorize the removal of the cause in its then condition can not be doubted. Insurance Company v. Dunn, 19 Wallace, 214. Did they by the terms and the spirit of this statute, so authorize its removal? The language of the statute is, *any* suit *now* pending, in other words, all suits *now* pending of the requisites may be removed, and the length of time which the suit had been pending, or the condition it was in if no final judgment had been rendered, could make no possible difference in the reason which operated upon Congress to confer the jurisdiction, as is clearly shown in the reasoning of the court in the case of Insurance Company v. Dunn.

The *term* referred to is the term at which *said cause*—what cause? The cause referred to in the second section, to-wit: any cause pending at the passage of the act could be first tried after the passage of the act, and not the terms, at which said cause could have been tried long before the passage of the act.

The motion will, therefore, be overruled.

Riparian Rights—Islands Springing up in the Missouri River.

BENSON *ET AL* v. MORROW *ET AL.*

Supreme Court of Missouri, Nov. 22, 1875.

Present, Hon. DAVID WAGNER, " WM. B. NAPTON, " T. A. SHERWOOD, } Judges.

Riparian Rights—Navigable Streams—Missouri River.—There are in Missouri no navigable streams within the meaning of the common or civil law definition of this term; but the Missouri river having been declared a navigable stream by act of Congress, the doctrine of riparian property, as established with regard to non-navigable streams, is not applicable to this river.

2. ——. ——. ——. The doctrine of Deerfield v. Arms, 17 Pick. 42, that the littoral proprietor on a non-navigable stream—that is, on a stream in which the tide does not ebb and flow, is *prima facie* the owner of the soil to the central thread of the river, subject to the right of the public to pass over in boats, etc., and hence, that if an island gradually forms in the stream, such proprietor is the owner of the soil of such island as far as what was formerly the central thread of the stream,—does not apply to our great public rivers, such as the Missouri. Here the littoral owner takes only to the margin of the stream. [Citing R. R. v. Schurmeir, 7 Wall. 272; The Schools v. Risley, 10 Wall. 110; Yates v. Milwaukee, 10 Wall. 504.] Islands springing up in such streams belong to the United States, and do not belong to the owners of other islands to which they may gradually become annexed; and so of accretions to an unnumbered and unsurveyed island belonging to the United States. But accretions formed upon an island belonging to a private person, are the property of such person, whether formed gradually or suddenly.

3. ——. **"Avulsion"—"Gradual and Imperceptible Accretion."**—The terms "avulsion" and "gradual and imperceptible accretion," by which writers distinguish lands formed in rivers by sudden floods from those formed by gradual deposits, have no application to such a river as the Missouri; and hence an instruction which tells the jury that an accretion to an island in the Missouri river, formed by a sudden flood, is not the property of the owner of such island, but of the United States, is error.

NAPTON, J., delivered the opinion of the court.

The plaintiffs in this ejectment suit were owners of three islands in the Missouri river, numbered 53, 54 and 55, and sued to recover possession of certain lands which were alleged to be accretions to one or two of said islands by alluvion.

The facts are not stated, nor the evidence—but it is stated that evidence was offered in support of the theories maintained by each side in the instructions offered.

The three islands belonging to plaintiffs were located in the the river in the order of their numbers, No. 53 being the uppermost, and No. 55 being the lowest down stream. The plaintiffs claimed that the land occupied by defendant was an accretion to island No. 55 or 54. The defendants contended that the lands they occupied were accessions to an unnumbered and unsurveyed island belonging to the United States.

The instructions given by the court at the instance of the defendants were:

1st. The term accretion as used in the instructions, means the gradual and imperceptible process of adding to land by the washings of the Missouri river, and the result of such process is termed alluvion or made land.

2d. The Missouri river is a public river, and all islands therein situate at the time the territory of this state was reclaimed by the United States, and not then or subsequently surveyed and numbered, and which have not been disposed of by the United States, still remain, with all accretions thereto, the property of the said United States Government, and if the jury believe from the evidence that the lands occupied by defendants are an unsurveyed and unnumbered and undisposed of island, with its accretions, by the United States Government, then the title of said island and its accretions, or alluvion, is in said United States, even if the said islands, accretions or alluvion has extended to No. 55 and connects with it—and said island and its accretions are not the plaintiffs', and the jury will find for the defendants.

3rd. If the jury believe that the lands occupied by the defendants were made by the violent action of the waters of the Missouri river in 1844 and 1845, suddenly and immediately, then the same is not the property of the owners of the west or upper end of island No. 55, but is the property of the United States, although they extend down to, and connect with the upper or west end of island No. 55.

4th. The question submitted to the jury is, whether the lands occupied by defendants are islands No. 53, 54 and 55 described in plaintiffs' petition—or are an island with its accretions, other than, and different from said islands 53, 54 and 55.

5th. It devolves upon the plaintiffs to show by evidence that defendants are occupying the identical islands and accretions described in plaintiffs' petition, or some part thereof.

The court gave these instructions and two others, of its own motion, to wit:—

1st. The court instructs the jury that the lands described in the petition as the S. E. fr. quarter of section 17 T. 45, R. 8 west, and all those lands described in section 16, at the time of their entry at the land office, was bounded by the Missouri river, and the same are admitted by the pleadings to belong to plaintiffs; and if the jury find from the evidence that the defendants occupied the same or any part thereof, at the commencement of this action, or any lands that are the products of gradual accretion to the same, they will find for plaintiffs.

2nd. The court also instructs the jury that the lands described as fractional sections 19 and 20 on islands 53 and 54, were also, when entered, bounded by the waters of the same river and are admitted to belong to the plaintiffs; and if the jury shall find from the evidence that, at the time of the commencement of the action, the defendants occupied the said land or any part thereof, or any lands that are the products of gradual accretions to the same, they will find for plaintiffs.

There was a verdict and judgment for defendants.

After the acquisition of the northwest territory from Virginia, and before the purchase of Louisiana in 1804, the United States established, perhaps in '98 or thereabouts, a system of surveys for their public lands, and passed laws in regard to the Mississippi and Missouri and other navigable streams, which materially modify the application of the common law and civil law doctrines in regard to riparian ownership. The title to nearly all the lands in Missouri depends on the laws of Congress and the system of surveys adopted by Congress.

I have heard it stated by an eminent lawyer who practiced in this state long before it was admitted into the Union, that there are only one or two complete Spanish grants in this state. Our public surveys terminate on the Missouri River, and it is the same with regard to the Osage as high up as Osceola, and the Gasconade for some distance, and no doubt some other streams—but the surveyors pay no regard to smaller streams not considered navigable, and sectionize them as though such streams had no exist-

ence. This may, perhaps, serve as a test of the navigability of a watercourse, since we have no navigable streams in this western country which come within the common or civil law definition of this term.

However this may be, it is certain that the Missouri river is declared a navigable stream by act of Congress, and that the doctrine of riparian property, as established in regard to non-navigable streams, is not applicable to this river. The ancient doctrine distinguishing navigable and non-navigable rivers, by their position above or below tide water, is still adhered to in most of the older states; but it is distinctly repudiated by the Supreme Court of the United States in R. R. Companies v. Schurman (7 Wallace, 272), and indeed could not well be reconciled with either the acts of Congress in relation to our larger rivers, or the system of public surveys adopted by Congress.

The rule in regard to non-navigable streams is very clearly stated by C. J. Shaw in Deerfield v. Arms 17 Pick. 42. "It seems very clearly settled," says Judge Shaw, "that upon all rivers not navigable (and all rivers are to be deemed not navigable above where the sea ebbs and flows) the owner of land adjoining the river is *prima facie* the owner of the soil to the central line or thread of the river, subject to an easement for the public to pass along and over it with boats, rafts and river craft. This presumption will prevail, in all cases, in favor of the riparian proprietor, unless controlled by some express words of description which exclude the bed of the river. In all cases, therefore, where the river itself is used as a boundary, the law will expound the grant as extending *ad filum medium aquæ*. We also consider it a well settled principle of law, resulting in part from the former, that when land is formed by alluvion in a river not navigable, by slow and imperceptible accretion, it is the property of the owner of the adjoining land, who, for convenience, and by a single term, may be called the riparian proprietor, and in applying this principle it is quite immaterial whether this alluvion forms at or against the shore, or whether it forms in the bed of the river and becomes an island. And when an island is so formed in the bed of a river as to divide the channel and form partly on each side of the thread of the river, if the lands on the opposite side of the river belong to different proprietors, the island will be divided, according to the original thread of the river, between the several proprietors."

This doctrine is quoted by Chancellor Kent in his discussion of riparian rights (3 Kent Com. p. 427, 12th ed.), and is substantially asserted in all the text books on this subject. Angell on water courses, title Alluvion.

The basis of this doctrine is found in the law of nations, and so far as the principle on which it rests is concerned, that may well be regarded in all its varied applications. That principle is, that "he who bears the incidental burdens of an acquisition, is entitled to its incidental advantages; consequently that the proprietor of a field bounded by a river, being exposed to the danger of loss from its floods, is entitled to the increment which from the same cause may be gradually annexed to it." Smith v. The Public Schools, 30 Mo. 300. And thus far the principle will apply to riparian owners on the Missouri river, or owners of islands in the middle of the stream.

But the application of the principle as made by the text writers and judges to non-navigable streams, can not be transferred to our great public rivers. The proprietor of land on the banks of the Missouri river, does not own *ad filum aquæ*, but only to the water's edge, though undoubtedly still entitled to whatever increment may be added to his land. He is not, however, the owner of an island that springs up in the midst of the stream, whether the island be on one side or the other of the thread of the river. He goes only to the margin of the river. The Schools v. Risley, 10 Wallace, 110; R. R. v. Schurmeir, 7 Wallace, 272; Yates v. Milwaukee, 10 Wallace, 504. Nor is the doctrine concerning rivers, deemed navigable at the common law, altogether applicable to our western rivers. That doctrine is, that the right of soil, of owners of land bounded by the sea or navigable waters, where the tide ebbs and flows, extend to high water-mark, and the shore below common, but not extraordinary high water-mark, belongs to the state as trustee of the public; and in England, the crown, and in this country, the people, have the absolute proprietory interest in the same. 3 Kent, Com. p. 427, 12th ed. The terms high water and low water-mark, will hardly be regarded as applicable to the Missouri river.

The term "avulsion," on the one hand, and "gradual and imperceptible accretion" on the other, are used by writers on alluvion to contradistinguish a sudden disruption of a piece of ground from one man's land to another, which may be followed and identified from increment which slowly or rapidly results from floods, but which is utterly beyond the power of identification.

We may with propriety dispense with such terms, when speaking of alluvion formed by the Missouri river, as only calculated to mislead. When land is torn from the banks of this stream and plunged into its turbid waters, its component parts are never after distinguishable—the sand, and clay, and soil, and trees, and roots, and logs, are soon utterly undistinguishable from any other similar substances, and their destination can never be traced, except that they ultimately go into the Gulf of Mexico, unless, previously to reaching the ocean, they are deposited on either bank or on some island. Mr. Livingston well observed in regard to this doctrine of "gradual and imperceptible accretion," "When the ingenious counsel can analyze the different deposits, separate the sands of Red river, the rich mould of the Missouri from the clay and other various soils which the Mississippi receives from a thousand tributary streams; when he can dive into its turbid eddies, watch the moment of its precious deposit, and date the existence of each stratum of its increase, then the first branch of the authority he has cited (*quantum quoque temporis adjiciatur*), may be applicable to his cause." 2 Hall L. J. 307. Even in Great Britain, C. J. Abbott has criticised the word "imperceptible" as used in this connection by judges and the law writers. He observes that "in these passages, Sir Mathew Hale is speaking of the legal consequences of such an accretion, and does not explain what ought to be considered as accretion insensible or imperceptible itself, but considers that as being insensible of which it can not be said with certainty that the sea was ever there." The King v. Lord Yarborough, 3 B. and Cress. 91.

The first and third instructions for the defendants should not have been given. The definitions to the jury therein, of accretions and avulsion, though copied from the text books, might for reasons already indicated, have misled the jury. Accretions in 1844 or 1845 might have created alluvion as well as if they had been 20 years in their accumulation. The length of time during their formation is not material. The real questions of fact on which the case turned are correctly propounded in the two instructions given by the court (omitting, as they should, the word "gradual") and in the 2d, 4th and 5th instructions asked by defendant.

If the alluvion in question was formed to a nameless island lying above island 55, which ultimately, before suit, had extended down to and connected itself with island 55, neither the alluvion nor the nameless island belonged to the owner of island 55. The unnumbered island belonged to the United States; but suppose it had been sold to a private citizen, and the alluvion formed at its lower end ultimately extended to island No. 55, would the owner of island 55 become the owner not only of the alluvion, but of the nameless island itself? It makes no difference, in the application of the principle, whether the nameless and unsurveyed island belonged to the United States or to some individual citizen.

Suppose the channel of the river between an island and the mainland is left dry by the water and entirely filled up with deposits of mud, and the island and mainland are at last one continuous tract of land, could the owner of either claim the entire tract? Certainly the newly formed land would either belong to the United States, or it would be divided between the opposite owners upon

the common law principle applicable to non-navigable streams, of each going to the thread of the channel; as it was before it was deserted by the water. In the event supposed, the river might be regarded as ceasing to be a navigable one, *pro hac vice*, or rather as being converted at the slough between the island and the shore, into a non-navigable one. In any event, the owner of the shore could not claim both the alluvion and the island, nor, *vice versa*, could the owner of the island claim the tract on the bank, with its accessions by alluvion.

The instructions asked by the plaintiffs are substantially given by the court in its two instructions.

If the alluvion was formed to island No. 55 or island 54, and not to the nameless island spoken of, the plaintiffs were entitled to recover, otherwise not, and that depended on facts not fully disclosed in the record or fairly passed on by the jury.

The judgment is reversed and the case remanded.

Judges Wagner and Sherwood concur; Judges Vories and Hough absent.

Dissolution of Partnerships by the Intervention the Late War.

MATTHEWS v. McSTEA.

Supreme Court of the United States, October Term, 1875.

Although the breaking out of a war, as a general rule, suspends commercial intercourse and dissolves partnerships existing between subjects or adherents of the opposing powers and although this doctrine applies to a civil war, particularly where it is sectional in its character; yet it is a rule which admits of exceptions; and in a civil, more than in a foreign war, or war declared, it is important that unequivocal notice should be given of the illegality of such intercourse; since in a civil war the government alone can know when the insurrection has assumed the character of war. In accordance with these views, it is held that the President's proclamation of April 15, 1861, was not a distinct recognition of a state of war, and that the proclamation of April 19 of the same year, establishing the blockade, did not suspend intercourse with the inhabitants of the insurrectionary states, except through the blockaded ports. Therefore it was not a good defence, in an action on a bill of exchange, drawn on the 23d day of April, 1861, on a house in New Orleans, one of whose members was a resident of the state of New York, and accepted by them, that the firm was at that date dissolved by the intervention of the war.

In error to the Court of Common Pleas for the City and County of New York.

Mr. Justice STRONG delivered the opinion of the court.

The judgment which this writ of error brings before us for review was given by the court of appeals in affirmance of a judgment against the plaintiff in error in the Court of Common Pleas of the City and County of New York.

The original cause of action was (*inter alia*) an acceptance of a bill of exchange by the firm of Brander, Chambliss & Co., of New Orleans, it being alleged that Matthews was, at the time of the acceptance, a member of that firm. The bill of exchange was dated April 23d, 1861, made payable in one year, to the order of McStea, Value & Co., and it was accepted by Brander, Chambliss & Co. on the day of its date. The principal defence, and the only one which presents a federal question, was that at the time when the acceptance was made, the defendant, Matthews, was a resident of the state of New York, that the other members of the firm (also made defendants in the suit) were residents of Louisiana, and that before the acceptance the co-partnership was dissolved by the war of the rebellion. This defence was not sustained in the common pleas, and the judgment of that court was affirmed by the court of appeals. The single question, therefore, for our consideration, is whether the partnership was dissolved by the war before April 23d, 1861.

That the civil war had an existence commencing before that date must be accepted as an established fact. This was fully determined in The Prize Cases, 2 Black, 635, and it is no longer open to denial. The President's proclamation of April 19, 1861, declaring that he had deemed it advisable to set on foot a blockade of the ports within the states of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana and Texas, was a recognition of a war waged, and conclusive evidence that a state of war existed between the people inhabiting those states and the United States.

It must also be conceded, as a general rule, to be one of the immediate consequences of a declaration of war, and the effect of a state of war even when not declared, that all commercial intercourse and dealing between the subjects or adherents of the contending powers is unlawful and is interdicted. The reasons for this rule are obvious. They are, that in a state of war, all the members of each belligerent are respectively enemies of all the members of the other belligerent, and, were commercial intercourse allowed, it would tend to strengthen the enemy and afford facilities for conveying intelligence, and even for tratorious correspondence. Hence, it has become an established doctrine, that war puts an end to all commercial dealing between the citizens or subjects of the nations or powers at war, and "places every individual of the respective governments, as well as the governments themselves, in a state of hostility." And it dissolves commercial partnerships existing between the subjects or citizens of the two contending parties prior to the war, for their continued existence would involve community of interest and mutual dealing between enemies.

Still further, it is undeniable that civil war brings with it all the consequences in this regard which attend upon and follow a state of foreign war. Certainly this is so when civil war is sectional. Equally with foreign war, it renders commercial intercourse unlawful between the contending parties, and it dissolves commercial partnerships.

But while all this is true, as a general rule, it is not without exceptions. A state of war may exist, and yet commercial intercourse be lawful. They are not necessarily inconsistent with each other. Trading with a public enemy may be authorized by the sovereign, and even to a limited extent, by a military commander. Such permissions, or licenses, are partial suspensions of the laws of war, but not of the war itself. In modern times they are very common. Bynkershoek, in his Quæst. Jur. Pub., lib. 1, ch. 3, while asserting as an universal principle of law that an immediate consequence of the commencement of war is the interdiction of all commercial intercourse between the subjects of the states at war, remarks, "the utility, however, of merchants, and the mutual wants of nations, have almost got the better of the laws of war as to commerce. Hence, it is alternatively permitted and forbidden in time of war, as princes think it most for the interests of their subjects. A commercial nation is anxious to trade, and accommodates the laws of war to the greater or lesser want that it may be in of the goods of others. Thus, sometimes a mutual commerce is permitted generally; sometimes, as to certain merchandise only, while others are prohibited; and, sometimes it is prohibited altogether." Halleck, in his Treatise on the Laws of War, p. 676, *et seq.*, discusses this subject at considerable length, and remarks: "That branch of the government to which, from the form of its constitution, the power of declaring or making war is entrusted, has an undoubted right to regulate and modify, in its discretion, the hostilities which it sanctions. * * In England, licenses are granted directly by the crown or by some subordinate officer to whom the authority of the crown has been delegated, either by special instructions, or under an act of Parliament. In the United States, as a general rule, licenses are issued under the authority of an act of Congress, but in special cases, and for purposes immediately connected with the prosecution of the war, they may be granted by the authority of the President as commander-in-chief of the military and naval forces of the United States."

It being, then, settled that a war may exist, and yet that trading with the enemy, or commercial intercourse may be allowable, we are brought to enquire whether such intercourse, was allowed between the loyal citizens of the United States and the citizens of

Louisiana, until the 23d of April, 1861, when the acceptance was made upon which this suit was brought. And, in determining this, the character of the war and the manner in which it was commenced ought not to be overlooked. No declaration of war was ever made. The President recognized its existence by proclaiming a blockade on the 19th of April, and it then became his duty as well as his right to direct how it should be carried on. In the exercise of this right he was at liberty to allow or license intercourse, and his proclamations, if they did not license it expressly, did, in our opinion, license it by very cogent implications. It is impossible to read them without a conviction that no interdiction of commercial intercourse, except through the ports of the designated states, was intended. The first was that of April 15, 1861. The forts and property of the United States had, prior to that day, been forcibly seized by armed forces. Hostilities had commenced, and in the light of subsequent events, it must be considered that a state of war then existed. Yet, the proclamation while calling for the militia of the several states, and stating what would probably be the first service assigned to them, expressly declared that "in every event, the utmost care would be observed, consistently with the repossession of the forts, places, and property which had been seized from the Union, to avoid any devastation, destruction of, or interference with propertr, or any disturbance of peaceful citizens in any part of the country."

Manifestly, this declaration was not a mere military order. It did not contemplate the treatment of the inhabitants of the states in which the unlawful combinations mentioned in the proclamation existed, as public enemies. It announced a different mode of treatment—the treatment due to friends. It is to be observed that the proclamation of April 15, 1861, was not a distinct recognition of an existing state of war. The president had power to recognize it (Prize Cases), but he did not prior to his second proclamation of April 19th, in which he announced the blockade. Even then, the war was only inferentially recognized, and the measures proposed were avowed to be "with a view to * * the protection of the public peace, and the lives and property of quiet and orderly citizens pursuing their lawful occupations, until Congress should have assembled." The reference here was plainly to citizens of the insurrectionary states, and the purpose avowed appears to be inconsistent with their being regarded as public enemies, and consequently, debarred from intercourse with the inhabitants of states not in insurrection. The only interference with the business relations of citizens in all parts of the country, contemplated by the proclamation, seems to have been such as the blockade might cause. And that it was understood to be an assent by the executive to continued business intercourse, may be inferred from the subsequent action of the government (of which we may take judicial notice), in continuing the mail service in Louisiana and the other insurrectionary states long after the blockade was declared. If it was not such an assent or permission, it was well fitted to deceive the public. But in a civil, more than in a foreign war, or a war declared, it is important that unequivocal notice should be given of the illegality of traffic or commercial intercourse; for in a civil war, only the government can know when the insurrection has assumed the character of war.

If, however, the proclamations, considered by themselves, leave it doubtful whether they were intended to be permissive of commercial intercourse with the inhabitants of the insurrectionary states, so far as such intercourse did not interfere with the blockade, the subsequent act of Congress passed on the 13th of July, 1861, ought to put doubt at rest.

The act was manifestly passed in view of the state of the country then existing, and in view of the proclamation the President had issued. It enacted that in a case therein described, a case that then existed, it should and might be lawful for the President, by proclamation, to declare that the inhabitants of such state, or any section or part thereof, where such insurrection exists, are in a state of insurrection against the United States; and *thereupon*, all commercial intercourse by and between the same and the citizens thereof, and the citizens of the rest of the United States, shall cease and be unlawful so long as such condition of hostility shall continue." Under authority of this act, the President did issue such a proclamation on the 16th of August, 1861, and it stated that all commercial interecourse between the states designated as in insurrection and the inhabitants thereof, with certain exceptions, and the citizens of other states and other parts of the United States, was unlawful. Both the act and the proclamation exhibit a clear implication that before the first was enacted, and the second was issued, commercial intercourse was not unlawful; that it had been permitted. What need of declaring it should cease, if it had ceased, or had been unlawful before? The enactment that it should not be permitted after a day then in the future, must be considered an implied affirmation that up to that day it was lawful, and certainly Congress had the power to relax any of the ordinary rules of war.

We think, therefore, the court of appeals was right in holding that the partnership of Brander, Chambliss & Co. had not been dissolved by the war when the acceptance upon which the plaintiff in error is sued was made.

The judgment is affirmed.

Charter of Union Pacific Railroad Company, Right of the Government to recover Five per Cent. of the Net Earnings of the Company.

THE UNITED STATES v. KANSAS PACIFIC RAILWAY COMPANY.

United States Circuit Court of Kansas, November Term, 1875.

Before Mr. Justice MILLER.

1. Under the act of Congress of July 1, 1862, 12 Stats. at Large, 489, (construing the charter of the Union Pacific Railroad Company and of the other companies therein named), the United States may recover of the companies receiving its bonds, and until such bonds and interest are paid, five per cent. of the net income, earned after the completion of the roads.

2. Such recovery may be had in an action at law.

DEMURRER TO PETITION. The defendant, formerly the Leavenworth, Pawnee and Western Railroad Company, was one of the roads aided by the act of Congress of July 1, 1862, and the amendatory act of July 2, 1864, relating to the Union Pacific Railroad, and other companies therein named. Bonds of the government were delivered to the defendant as provided in said act, amounting in all, as alleged, to $6,303,000, payable in thirty years, with interest at six per cent., payable semi-annually. The defendant's road is averred to have been completed November 2, 1869, and that since then to the 31st day of October, 1874, the net earnings of the road have amounted to $6,176,602.60, and that five per cent. of said net earnings during said period amount to $308,830.13. The act of Congress of July 1, 1862, provides as follows:

Sec. 6. "The grants aforesaid are made upon condition that said company shall pay said bonds at maturity * * * and all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes or other evidences of debt against the United States to be allowed at par; *and after said road is completed, until said bonds and interest are paid, at least five per cent. of the net earnings of said road shall also be annually applied to the payment thereof.*"

This is a suit at law to recover the said five per cent. of the net earnings. The petition alleges the foregoing facts, and a demand and refusal to pay. A demurrer to the petition was filed under which the following points were made by the defendant, and

argued, and submitted to the court at the May term, 1875, before Miller, Circuit Justice, viz :—

1. That the provision of the act of 1862, set forth in the petition, does not impose any obligation on the company to pay money to the government, but is merely a directory provision, regulating the management of the internal affairs of the company.

2. That if the provision in question does create an obligation binding the company to pay a proportion of its net earnings to the government, such right is of an equitable nature, enforceable only by proceedings for account, and can not be made the foundation of an action at common law.

The cause was taken under advisement, and at the November term, 1875, an order was directed to be entered overruling the demurrer.

J. P. Usher, C. E. Bretherton, for the demurrer; *Geo. R. Peck*, District Attorney, for the United States.

MILLER, Circuit Justice, in directing the entry of an order overruling the demurrer, in substance observed that he had never had any doubt that the demurrer must be overruled, but he had held it up on suggestion of counsel that the argument of the case of the Union Pacific Railroad Company v. The United States, on appeal from the court of claims might involve propositions affecting this case. That was a suit brought by the company against the United States, to recover the one-half of the freight earned by the company for carrying mails, etc., for the United States—the government claiming, that *all* such earnings should go to pay the interest on the government bonds. That case was recently argued in the Supreme Court of the United States, and nothing was developed touching the right of the government to recover the five per cent. of the net income, after the completion of the road, a right given in the original charter of July 1, 1862, and which in this respect has never been repealed or modified. Let the demurrer be overruled. ENTERED ACCORDINGLY.

Second Conveyance without reciting Previous One—Construction of Missouri Statute.

J. M. ARMSTRONG v. CALEB WINFREY.

Supreme Court of Missouri, November, 1875.

Present, Hon. DAVID WAGNER, } Judges.
" T. A. SHERWOOD, }
" WARWICK HOUGH, }

A statute of Missouri makes it a misdemeanor to give, with intent to defraud, a deed or mortgage of land which has been previously conveyed, unless the second deed recite the former. 1 Wag. Stat., p. 462, § 52. The plaintiff conveyed land to a railroad company and, afterwards, under a mistaken impression of the purport of a decision of the supreme court, conveyed the same property by quit-claim deed to the defendant, the second deed not mentioning the first. But the defendant was fully cognizant of the previous conveyance, entered into the transaction as a speculation, and was eager to make the purchase. *Held*, in an action on some of the notes given for the purchase-money, that it was not a good defence to urge that the conveyance was void, because denounced by a statute of the state. The statute denounces only conveyances made *with an intent to defraud*, and not those where the purchaser has full knowledge of the previous conveyance.

Error to the Circuit Court of Cass County.

Boggess & Sloan and *Comingo*, for plaintiff in error; *Hicks & Adams*, for defendant in error.

WAGNER, J., delivered the opinion of the court.

From the record it appears that in 1858 the plaintiff was the owner of twenty acres of land adjoining the town of Pleasant Hill, in Cass county, and that in the same year he sold and conveyed the same by deed of general warranty to the Pacific Railroad Company, and that the deed was duly placed upon record. The railroad company laid out an addition to the town on the tract of land, erected their depot thereon, sold lots, and in consequence it has become valuable. At the January term, 1870, of this court, a decision was rendered in the case of the Pacific Railroad v. Seely *et al.*, from which the conclusion was deduced that the deed from the plaintiff to the railroad company was inoperative and conveyed no title, and that the real title to the land still remained in the plaintiff. Whilst laboring under this mistaken view of the purport of the decision in the Seely case, the defendant conceived the idea of purchasing from the plaintiff the twenty acre tract which had previously been conveyed to the railroad company. Several interviews were had between the parties, and the whole matter was canvassed; both were equally cognizant of all the facts, and finally a bargain was consummated by which plaintiff agreed to sell to defendant, by quit-claim, the twenty acre tract previously sold to the railroad company, and a thirty-four acre tract of land lying in a different place, and also to assign to him a judgment against one McKinson for about five hundred dollars. The consideration which the defendant was to pay for the whole was eleven thousand nine hundred dollars, to be paid as follows: two thousand dollars in money at the time; two thousand five hundred dollars on the first of April next ensuing; and the remainder in four equal amounts of eighteen hundred and fifty dollars each, to be paid respectively in three, six, nine and twelve months. In accordance with this agreement the plaintiff executed a quit-claim conveyance for the twenty acre tract, assigned the judgment and gave title-bond obligating himself to make a conveyance for the thirty-four acre tract. The consideration has all been paid except the last two notes, which are the ones herein sued upon.

As a defence the answer alleged that the transaction was illegal, and that there was a failure of consideratton for the execution of the notes. On a trial before the court the judgment was for the defendant.

The only point in the case about which there is any controversy, is the sale and conveyance of the twenty acre tract. It is insisted, first, that the transaction was illegal by the statute law of this state; and secondly, that it was fraudulent and against public policy; and therefore an action will not lie upon it. The provision of the statute invoked to sustain this view, is the 52d section of the 3d article in regard to crimes and punishment. 1 Wagner's Statutes, p. 462. The following is the section:

"Every person who shall make, execute or deliver any deed or writing for the conveyance or assurance of any lands, tenements or hereditaments, goods or chattels, which he had previously, by deed or writing, sold, conveyed, mortgaged, or assured, or convenated to convey or assure, to any other person, such first deed being outstanding and in force, and shall not in such second deed or writing recite or describe such former deed or writing, or the substance thereof, with intent to defraud; and every person who shall knowingly take or receive such second deed or writing, shall, on conviction, be adjudged guilty of a misdemeanor."

The object of the statute was obviously intended to prevent fraud, and its penalty is denounced against the making of the deed with a fraudulent intent. The simple making of a second deed, whilst a former one is outstanding and in force, without reciting the same, does not constitute the offence, if there is no intention to defraud, and the deed does not have that effect. There must be a fraudulent intent designed to operate to the injury or detriment of some person.

In the case of Gilmore v. Cook (33 Mo. 25), which was an action on promissory notes given for the purchase-money for land which had been conveyed to the defendant by a quit-claim deed, the defence was set up that the plaintiff fraudulently concealed from defendants, at the time of the sale and conveyance, the fact that he had previously granted to the North Missouri Railroad Company the right of way through the land. At the trial it was shown that the deed to the defendants made no allusion to the prior grant, but it was proved that the defendants were fully aware of, and had knowledge of that fact, and it was held that the matter set up in the answer constituted no defence; that a grantee, by quit claim deed, who at the time of his purchase, had notice of previous grant by his grantor,

could not allege that he was defrauded on the ground that the notice was not of a particular kind, as by recital in the deed.

It is plain enough in the present case that there could have been no intention to defraud the defendant, for he was well acquainted with all the facts, and made the first proposition to purchase of the plaintiff. He thought he saw a chance for a speculation, and was willing to risk his money on the venture. It cannot be said that there was any design to defraud the Pacific Railroad Company, because its deed was on record—its rights were fixed, and the plaintiff had no power whatever to change them. The defendant, knowing of the existence of all these facts, could not be an innocent purchaser and could not be defrauded. It is a familiar doctrine that no valid contract can arise out of a fraud, and that any action brought upon a supposed contract which is shown to have arisen from fraud, may be sucessfully resisted. Fraud avoids all contracts, where it can be shown that if it had not been employed the contracts would not had been made. But the record does not disclose that there was any fraudulent representation whatever in this case. There was no artifice or trick resorted to for the purpose of circumventing the defendant; he appears to have been the most eager to consummate the transaction; he simply made a bad bargain, but the law will not assist an improvident purchaser, nor will it interpose where both the contracting parties are equally well informed of the actual condition of the subject-matter of the contract.

There is nothing in the position advanced that the contract was so palpably against public policy that it should be held void. If the plaintiff possessed any title to the property he had the legal right to dispose of it. There was nothing illegal in his action, though in a moral sense, the transaction reflects no credit upon him, nor on the members of his church, whom he says he consulted before he made the sale.

The judgment must be reversed and the cause remanded.

Judges Sherwood and Hough concur; Judges Vories and Napton not sitting.

Liability of Agent for Collection of Time Draft for Delivering Bill of Lading to Drawee on Acceptance and before Payment.

NATIONAL BANK OF COMMERCE OF BOSTON v. MERCHANT'S NAT. BANK OF MEMPHIS.

Supreme Court of the United States, No. 15, October Term, 1875.

A bill of lading of merchandise, deliverable to order, when attached to a time draft, and forwarded with the draft to an agent for collection, without any special instructions, may be surrendered to the drawee by the agent on his acceptance of the draft, and in case of non-payment of the draft, the agent will not be liable The agent would not be justified in refusing to surrender the bill of lading, because this would disable the acceptor from making payment out of the property assigned for that purpose. It would be otherwise, if the agent had special instructions to hold the bill of lading until payment of the draft. [Acc. Lanfear v. Blossman, 1 La. An. 148; Wis. M & F. Ins. Co. v. Bank of British North America, 21 Up. Can. Rep., Q. B., 284; s. c., on review, 2 Up. Can. Error & Ap. Rep. 282; Case in 14 Hunt's Merchant's Mag. 264; and other cases. Distinguishing Gilbert v. Guignon, Law Rep. 8 Chan. 16; Seymour v. Newton, 105 Mass. 272; Newcomb v. Boston & Lowell R. Co., 115 Mass. 230; Stollenwerck v. Thatcher, 115 Mass. 224; and Bank v. Bayley, Ibid., 228.]

In error to the Circuit Court of the United States for the District of Massachusetts.

Mr. Justice STRONG delivered the opinion of the court.

The fundamental question in this case is whether a bill of lading of merchandise deliverable to order, when attached to a time draft and forwarded with the draft to an agent for collection, without any special instructions, may be surrendered to the drawee on his acceptance of the draft, or whether the agent's duty is to hold the bill of lading after the acceptance, for the payment. It is true there are other questions growing out of portions of the evidence, as well as one of the findings of the jury; but they are questions of secondary importance. The bills of exchange were drawn by cotton brokers residing in Memphis, Tennessee, on Green & Travis, merchants residing in Boston. They were drawn on account of cotton shipped by the brokers to Boston, invoices of which were sent to Green & Travis, and bills of lading were taken by the shippers, marked in case of two of the shipments "to order," and in case of the third shipment marked "for Green & Travis, Boston, Mass." There was an agreement between the shippers and the drawees that the bill of lading should be surrendered on acceptance of the bills of exchange, but the existence of this agreement was not known to the bank of Memphis when that bank discounted the drafts and took with them the bills of lading endorsed by the shippers. We do not propose to enquire now whether the agreement, under these circumstances, ought to have any effect upon the decision of the case. Conceding that bills of lading are negotiable, and that their endorsement and delivery pass the title of the shippers to the property specified in them, and, therefore, that the plaintiffs when they discounted the drafts and took the endorsed railroad receipts, or bills of lading, became the owners of the cotton; it is still true they sent the bills with the drafts to their correspondents in New York, the Metropolitan Bank, with no instructions to hold them after acceptance. And the Metropolitan Bank transmitted them to the defendants in Boston, with no other instruction than that the bills were sent "for collection." What, then, was the duty of the defendants? Obviously it was first to obtain the acceptance of the bills of exchange. But Green & Travis were not bound to accept, even though they had ordered the cotton, unless the bills of lading were delivered to them contemporaneously with their acceptance. Their agreement with their vendors, the shippers, secured them against such an obligation. Moreover, independent of this agreement, the drafts upon their face showed that they had been drawn upon the cotton covered by the bills of lading. Both the plaintiffs and their agents, the defendants, were thus informed that the bills were not drawn upon any funds of the drawers in the hands of Green & Travis, and that they were expected to be paid out of the proceeds of the cotton. But how could they be paid out of the proceeds of the cotton if the bills of lading were withheld? Withholding them, therefore, would defeat alike the expectation and the intent of the drawers of the bills. Hence, were there nothing more, it would seem that a drawer's agent to collect a time bill, without further instructions, would not he justified in refusing to surrender the property against which the bill was drawn, after its acceptance, and thus disable the acceptor from making payment out of the property designated for that purpose.

But it seems to be a natural inference, indeed a necessary implication, from a time draft accompanied by a bill of lading endorsed in blank, that the merchandise (which in this case was cotton) specified in the bill was sold on credit, to be paid for by the accepted draft, or that the draft is a demand for an advance on the shipment, or that the transaction is a consignment to be sold by the drawee on account of the shipper. It is difficult to conceive of any other meaning the instruments can have. If so, in the absence of any express arrangement to the contrary, the acceptor, if a purchaser, is clearly entitled to the possession of the goods on his accepting the bill and thus giving the vendor a completed contract for payment. This would not be doubted if, instead of an acceptance, he had given a promissory note for the goods, payable at the expiration of the stipulated credit. In such a case it is clear the vendor could not retain possession of the subject of the sale after receiving the note for the price. The idea of a sale on credit is that the vendee is to have the thing sold, on his assumption to pay, and before actual payment. The consideration of the sale is the note. But an acceptor of a bill of exchange stands in the same position as the maker of a promissory note. If he has purchased on credit and is denied possession until he shall make payment, the transaction ceases to be what is was intended, and is converted into a cash sale. Everybody understands that a sale on credit

entitles the purchaser to immediate possession of the property sold, unless there be a special agreement that it may be retained by the vendor, and such is the well recognized doctrine of the law. The reason for this is that very often, and with merchants generally, the thing purchased is needed to provide means for the deferred payment of the price. Hence, it is justly inferred that the thing is intended to pass at once within the control of the purchaser. It is admitted that a different arrangement may be stipulated for. Even in a credit sale it may be agreed by the parties that the vendor shall retain the subject until the expiration of the credit, as a security for the payment of the sum stipulated. But if so, the agreement is special, something superadded to an ordinary contract of sale on credit, the existence of which is not to be presumed. Therefore, in a case where the drawing of a time draft against a consignment raises the implication that the goods consigned have been sold on credit, the agent to whom the draft to be accepted and the bill of lading to be delivered have been entrusted, can not reasonably be required to know, without instruction, that the transaction is not what it purports to be. He has no right to assume and act on the assumption that the vendee's term of credit must expire before he can have the goods, and that he is bound to accept the draft, thus making himself absolutely responsible for the sum named therein, and relying upon the vendor's engagement to deliver at a future time. This would be treating a sale on credit as a mere executory contract to sell at a subsequent date.

And, if the inference to be drawn from a time draft accompanied by a bill of lading is not that it evidences a credit sale, but a request for advances on the credit of the consignment, the consequence is the same. Perhaps it is even more apparent. It plainly is that the acceptance is not asked on the credit of the drawer of the draft, but on the faith of the consignment. The drawee is not asked to accept on the mere assurance that the drawer will at a future day deliver the goods to reimburse the advances. He is asked to accept in reliance on a security in hand. To refuse to him that security is to deny him the basis of his requested acceptance. It is remitting him to the personal credit of the drawer alone. An agent for collection having the draft and attached bill of lading can not be permitted, by declining to surrender the bill of lading on the acceptance of the bill, to disappoint the obvious intentions of the parties, and deny to the acceptor a substantial right which by his contract is assured to him. The same remarks are applicable to the case of an implication that the merchandise was shipped to be sold on account of the shipper.

Nor can it make any difference that the draft with the bill of lading has been sent to an agent (as in this case) "for collection." That instruction means simply to rebut the inference from the endorsement that the agent is the owner of the draft. It indicates an agency. Sweeny v. Easter, 1 Wallace, 166. It does not conflict with the plain inference from the draft and accompanying bill of lading that the former was a request for a promise to pay at a future time for goods sold on credit, or a request to make advances on the faith of the described consignment, or a request to sell on account of the shipper. By such a transmission to the agent he is instructed to collect the money mentioned in the drafts, not to collect the bill of lading. And the first step in the collection is procuring acceptance of the draft. The agent is, therefore, authorized to do all which is necessary to obtaining such acceptance. If the drawee is not bound to accept without the surrender to him of the consigned property or of the bill of lading, it is the duty of the agent to make that surrender, and if he fails to perform this duty, and in consequence thereof acceptance be refused, the drawer and endorsers of the draft are discharged. Mason v. Hunt, 1 Douglas, 297.

The opinions we have suggested are supported by other very rational considerations. In the absence of special agreement, what is the consideration for acceptance of a time draft drawn againt merchandise consigned? Is it the merchandise, or is it the promise of the consignor to deliver? If the latter, the consignor may be wholly irresponsible. If the bill of lading be to his order, he may, after acceptance of the draft, endorse it to a stranger, and thus wholly withdraw the goods from any possibility of their ever coming to the hands of the acceptor. Is, then, the acceptance a mere purchase of the promise of the drawer? If so, why are the goods forwarded before the time designated for payment? They are as much after shipment under the control of the drawer as they were before. Why incur the expense of storage and insurance? And if the draft with the goods or with the bill of lading be sent to a bank for collection, as in the case before us, can it be incumbent upon the bank to take and maintain custody of the property sent during the interval between the acceptance and the time fixed for payment? (The shipment in this case were hundreds of bales of cotton). Meanwhile, though it be a twelvemonth, and no matter what the fluctuations in the market value of the goods may be, are the goods to be withheld from sale or use? Is the drawee to run the risk of falling prices with no ability to sell till the draft is due? If the consignment be of perishable articles, such as peaches, fish, butter, eggs, etc., are they to remain in a warehouse until the term of credit shall expire? And who is to pay the warehouse charges? Certainly not the drawees. If they are to be paid by the vendor, or one who has succeeded to the place of the vendor by endorsement of the draft and bill of lading, he fails to obtain the price for which the goods were sold.

That the holder of a bill of lading, who has become such by endorsement, and by discounting the draft drawn against the consigned property, succeeds to the situation of the shipper, is not to be doubted. He has the same right to demand acceptance of the accompanying bill, and no more. If the shipper can not require acceptance of the draft without surrendering the bill of lading, neither can the holder. Bills of lading, though transferrable by endorsement, are only *quasi* negotiable. 1 Parsons on Shipping, 192; Blanchard v. Page, 8 Gray, 297. The endorser does not acquire a right to change the agreement between the shipper and his vendee. He can not impose obligations or deny advantages to the drawee of the bill of exchange drawn against the shipment which were not in the power of the drawer and consignor. But were this not so, in the case we have now in hand, the agents for collection of the drafts were not informed, either by the drafts themselves or by any instructions they received, or in any other way, that the ownership of the drafts and bills of lading was not still in the consignors of the cotton. On the contrary, as the drafts were sent "for collection," they might well conclude that the collection was to be made for the drawers of the bills. We do not, therefore, perceive any force in the argument pressed upon us that the bank of Memphis was the purchaser of the drafts drawn upon Green and Travis, and the holder of the bills of lading by endorsement of the shippers.

It is urged that the bills of lading were contracts collateral to the bills of exchange which the bank discounted, and that when transferred they became a security for the principal obligation, namely, the contract evidenced by the bills of exchange; for the *whole* contract, and not a part of it, and that the whole contract required not only the acceptance, but the payment of the bills. The argument assumes the very thing to be proved, to-wit: that the transfer of the bills of lading were made to secure the payment of the drafts. The opposite of this, as we have seen, is to be inferred from the bills of lading and the time drafts drawn against the consignments, unexplained by express stipulations. The bank, when discounting the drafts, was bound to know that the drawers on their acceptance were entitled to the cotton, and, of course, to the evidences of title to it. If so, they knew that the bills of lading could not be security for the ultimate payment of the drafts. Payment of the drafts by the drawees was no part of the contracts when the discounts were made. The bills of exchange were then incomplete. They needed acceptance. They were discounted in

the expectation that they would be accepted, and that thus the bank would obtain additional promissors. The whole purpose of the transfers of the bills of lading to the bank may, therefore, well have been satisfied when the additional names were secured by acceptance, and when the drafts thereby became completed bills of exchange. We have already seen that whether the drafts and accompanying bills of lading evidenced sales on credit, or requests for advancements on the cotton consigned, or bailments to be sold on the consignor's account, the drawees were entitled to the possession of cotton before they could be required to accept, and that if they had declined to accept because possession was denied to them concurrently with their acceptance, the effect would have been to discharge the drawers and endorsers of the drafts. The demand of acceptance, coupled with a claim to retain the bills of lading, would have been an insufficient demand. Surely, the purpose of putting the bills of lading into the hands of the bank was to secure the completion of the drafts by obtaining additional names upon them, and not to discharge the drawers and endorsers, leaving the bank only a resort to the cotton pledged.

It is said that if the plaintiffs were not entitled to retain the bills of lading as security for the payment of the drafts after their acceptance, their only security for payment was the undertaking of the drawees, who were without means, and the promise of the acceptors, of whose standing and credit they knew nothing. This may be true, though they did know that the acceptors had previously promptly met their acceptances, which were numerous and large in amount. But if they did not choose to rely solely on the responsibility of the acceptors and drawers, they had it in their power to instruct their agents not to deliver the cotton until the drafts were paid. Such instructions are not unfrequently given in case of time drafts against consignments, and the fact that they are given tends to show that in the commercial community it is understood, without them, agents for collection would be obliged to give over the bills of lading on acceptance of the draft. Such instructions would be wholly unnecessary, if it is the duty of such agents to hold the bills of lading as securities for the ultimate payment.

Thus far we have considered the question without reference to any other authority than that of reason. In addition to this, we think the decisions of the courts and the language of many eminent judges accord with the opinions we avow. In the case of Lanfear v. Blossman, 1 La. An. 148, the very point was decided, after an elaborate argument both by the counsel and by the court. It was held that "where a bill of exchange drawn on a shipment, and payable a certain number of days after sight, is sold, with the bill of lading appended to it, the holder of the bill of exchange can not, in the absence of proof of any local usage to the contrary, or of the imminent insolvency of the drawee, require the latter to accept the bill of exchange, except on the delivery of the bill of lading; and when, in consequence of the refusal of the holder to deliver the bill of lading, acceptance is refused and the bill protested, the protest will be considered as made without cause, the drawee not having been in default, and the drawer will be discharged." This decision is not to be distinguished in its essential features from the opinions we have expressed. A judgment in the same case to the same effect was given in the Commercial Court of New Orleans by Judge Watts, who supported it by a very convincing opinion. 14 Hunt's Merchants' Magazine, 264. These decisions were made in 1845 and 1846. In other courts, also, the question has arisen, what is the duty of a collecting bank to which time drafts, with bills of lading attached, have been sent for collection? and the decisions have been that the agent is bound to deliver the bills of lading to the acceptor on his acceptance. In the case The Wisconsin Marine and Fire Insurance Company v. The Bank of British North America, 21 Upper Canada Queen's Bench Reps. 284, decided in 1861, where it appeared that the plaintiff, a bank at Milwaukee, Wisconsin, had sent to the defendants, a bank at Toronto, for collection, a bill drawn by A., at Milwaukee, on B. at Toronto, payable forty-five days after date, together with a bill of lading, endorsed by A., for certain wheat sent from Milwaukee to Toronto, it was held that, in the absence of any instructions to the contrary, the defendants were not bound to retain the bill of lading until payment of the draft by B., but were right in giving it up to him on obtaining his acceptance. This case was reviewed, in 1863, in the court of error and appeals, and the judgment affirmed. 2 Upper Canada Error and Appeals Reps. 282. See, also, Goodenough v. The City Bank, 10 Up. Canada Com. Pleas, 51; Clark v. The Bank of Montreal, 13 Grant's Cha. 211.

There are also many expressions of opinion by the most respectable courts, which though not judgments, and, therefore, not authorities, are of weight in determining what are the implications of such a state of facts as this case exhibits. In Shepherd v. Harrison, Law Rep., Q. B., vol. 4, p. 493, Lord Cockburn said: "The authorities are equally good to show, when the consignor sends the bill of lading to an agent in this country to be by him handed over to the consignee, and accompanies that with bills of exchange to be accepted by the consignee," that that "indicates an intention *that the handing over of the bill of lading and the acceptance of the bill or bills of exchange, should be concurrent parts of one and the same transaction.*" The case subsequently went to the House of Lords, 5 H. L. 133, where Lord Cairns said: "If they (the drawees) accept the cargo and bill of lading, and accept the bill of exchange drawn against the cargo, the object of those who shipped the goods is obtained. They have got the bill of exchange of in return for the cargo; they discount, or use it as they think proper, and they are virtually paid for the goods." In Coventry v. Gladstone, 4 Law Rep. Eq. 493, it was declared by the Vice-Chancellor that "the parties shipping the goods from Calcutta, in the absence of any stipulation to the contrary, did give their agents in England full authority, if they thought fit, to pass over the bill of lading to the person who had accepted the bill of exchange" drawn against the goods and attached to the bill of lading, and it was ruled that an alleged custom of trade to retain the bill of lading until payment of the accompanying draft on account of the consignment, was exceptional, and was not established as being the usual course of business. In Schuhart *et al.* v. Hall *et al.*, 39 Maryland, 590, which was a case of a time draft, accompanied by a bill of lading, hypothecated by the drawers, both for the acceptance and payment of the draft, and when the drawers had been authorized to draw against the cargo shipped, it was said by the court, "under their contract with the defendants the latter were authorized to draw only against the cargo of wheat to be shipped by the Ocean Belle, and they (the drawees) were, therefore, not bound to accept without the delivery to them of the bill of lading." See also the language of the judges in Gurney v. Behrend, 3 E. and Bl. 622; Marine Bank v. Wright, 48 N. Y. 1; Cayuga Bank v. Daniels, 47 N. Y. 631.

We have been unable to discover a single decision of any court holding the opposite doctrines. Those to which we have been referred as directly in point, determine nothing of the kind. Gilbert v. Guignon, Law Reps., 8 Cha. 16, was a contest between two holders of several bills of lading of the same shipment. The question was which had priority. It was not at all whether the drawee of a time draft against a consignment has not a right to the bill of lading when he accepts. The drawee had accepted without requiring the surrender of the first endorsed bill of lading, and the Lord Chancellor, while suggesting a query whether he might not have declined to accept unless the bills of lading were at the same time delivered up to him, remarked: "If he was content they should remain in the hands of the holder, it was exactly the same thing as if he had previously and originally authorized that course of proceeding, and that (according to the Chancellor's view), was actually what had happened in the case." Nothing, therefore, was decided respecting the rights of the holder

of a time draft, to which a bill of lading is attached, as against the drawee. The contest was wholly *inter alios partes*.

Seymour v. Newton, 105 Mass. 272, was the case of an acceptance of the draft, without the presentation of the bill of lading. In that respect it was like Gilbert v. Guignon. No question, however, was made in regard to this. The acceptor became insolvent before the arrival of the goods, and all that was decided was that under the circumstances, the jury would be authorized to find that the lien of the shippers had not been discharged. It was a case of stoppage *in transitu*. It is true that in delivering the opinion of the court Chief Justice Chapman said "the obvious purpose was that there should be no delivery to the vendee till the draft should be paid." But the remark was purely obiter, uncalled for by anything in the case. Newcomb v. The Boston and Lowell Railroad Corporation, 115 Mass. 230, was also the case of acceptance of sight drafts without requiring the delivery of the attached bills of lading, and the contest was not between the holder of the drafts and the acceptor. It was between the holder of the drafts with the bills of lading, and the carrier. We do not perceive that the case has any applicability to the question we have now under consideration. True, there, as in the case of Seymour v. Newton, it was remarked by the judge who delivered the opinion, "the railroad receipts were manifestly intended to be held by the collecting bank as security for the acceptance and payment of the drafts." Intended by whom? Evidently the court meant by the drawees and the bank, for it is immediately added: "they continued to be held by the bank after the drafts had been accepted by Chandler & Co. (the drawees), and until at Chandler & Co.'s request they were paid by the plaintiff, and the receipts with the drafts still attached were endorsed and delivered by Chandler & Co. to the plaintiff." In Stollenwerck *et al.* v. Thatcher *et al.*, 115 Mass., 224 (the only other case cited by the defendants in error as in point on this question), there were instructions to the agent to deliver the bill of lading only on payment of the draft, and it was held that the special agent, thus instructed, could not bind his principal by a delivery of the bill without such payment. Nothing was decided that is pertinent to the present case. In Bank v. Bayley, reported in the same volume, p. 228, where the instructions given to the collecting agent were, so far as it appears, only that the drafts and bills of lading were remitted for collection, and where acceptance was refused, Chief Justice Gray said, "the drawees of the draft attached to each of the bills of lading were not entitled to the bill of lading or the property described therein, except upon *acceptance* of the draft." It is but just to say, however, that this remark as well as those made by the same judge in the other Massachusetts cases cited, was aside from the decision of the court.

After this review of the authorities cited, as in point, in the very elaborate argument for the defendants in error, we feel justified in saying that, in our opinion, no respectable case can be found in which it has been decided that when a time draft has been drawn against a consignment to order, and has been forwarded to an agent for collection with the bill of lading attached, without any further instructions, the agent is not justified in delivering over the bill of lading on the acceptance of the draft.

If this, however, were doubtful, the doubt ought to be resolved favorably to the agent. In the case in hand, the Bank of Commerce having accepted the agency to collect, was bound only to reasonable care and diligence in the discharge of its assumed duties. Warren v. The Suffolk Bank, 10 Cushing, 582. In a case of doubt, its best judgment was all the principal had a right to require. If the absence of specific instructions left it uncertain what was to be done further than to procure acceptances of the drafts, and to receive payment when they fell due, it was the fault of the principal. If the consequence was a loss, it would be most unjust to cast the loss on the agent.

Applying what we have said to the instruction given by the learned judge of the circuit court to the jury, it is evident that he was in error. Without discussing in detail the several assignments of error, it is sufficient for the necessities of this case, to say it was a mistake to charge the jury as they were charged, that "In the absence of any consent of the owner of a bill of exchange, other than such as may be implied from the mere fact of sending 'for collection' a bill of exchange with a bill of lading pasted or attached to a bill of exchange, the bank so receiving the two papers for collection would not be authorized to separate the bill of lading from the bill of exchange and surrender it before the bill of exchange was paid." And again, there was error in the following portion of the charge: "But if the Metropolitan Bank merely sent to the defendant bank the bills ef exchange with the bills of lading attached for collection, with no other instructions, either expressed or implied from the past relations of the parties, they would not be so justified in surrendering [the bills of lading] on acceptance only." The Bank of Commerce can be held liable to the owners of the drafts for a breach of duty in surrendering the bills of lading on acceptance of the drafts, only after special instructions to retain the bills until payment of the asceptances. The drafts were all time drafts. One, it is true, was drawn at sight, but in Massachusetts such drafts are entitled to grace.

What we have said renders it unnecessary to notice the other assignments of error.

The judgment of the circuit court is reversed and the record is remitted with directions to award a new trial.

Summary of Our Legal Exchanges.

AMERICAN LAW RECORD.*

Warranty as to use of Intoxicating Drugs—Evidence—Onus probandi.—N. Y. Life Ins. Co. v. La Bonteaux. Opinion by Yaple, J. [4 Am. L. Rec. 1]. 1. Weere a policy of life insurance contains a warranty clause, that if the death of the insured shall be caused by the use of intoxicating drinks, or opium, the policy shall be null and void, such clause only covers the voluntary use by the assured of such drinks, or opium, or both, to a degree that shall cause his death; and does not apply to a case in which alcoholic liquors, or opium, or both are administered by a physician to the insured, in treating him in sickness, and they or either cause death, though such sickness may have been occasioned by their excessive voluntary use by the assured. 2. If the assured, by a policy containing such clause, voluntarily used intoxicating drinks to such excess that *delerium tremens* is produced, and medical aid and nursing becomes necessary, and he dies from the sickness in consequence of neglect, or not being properly attended to, or from acts or conduct of his own while sick and crazed, or in consequence of not being skillfully treated by his physician, his death will be caused by the use of intoxicating drinks, within the meaning of such clause in the policy, and no recovery can be had against the insurer. 3. But if, in such case, the sickness resulting from such intoxication be not fatal, and the assured is able to recover from it, and the physician or others, in endeavoring to effect a cure, administer opium or other drugs, from the immediate effect of which, and not of such sickness, he dies, such death is not covered by such clause in the policy, and a recovery can be had against the insurer. The *intention* with which the agency immediately and proximately causing death is employed, is immaterial. It is the fact only that controls. 4. What an attending physician in such a case told others were the medicines he had been prescribing and causing to be administered to the insured, is hearsay, and not admissible in evidence to prove that such medicines were prescribed or administered. Nor can such statement be introduced in evidence to impeach the testimony of the attending physician, if he has not been properly interrogated concerning them. But, where he called in a consulting physician, during the sickness of the patient, and the testimony of the latter is taken to prove the cause of death—the symptoms and condition of the patient, what in his opinion, caused them, what course of treatment he recommended, to-wit, the same as the attending physician had theretofore pursued, it is competent to prove by him, on cross-examination, what the attending physician told him the medicines theretofore administered, were. This is proper in order to test the grounds and value of the witness's opinion as an expert, and his knowledge and skill in the treatment of cases of the kind. 5. When the law casts the burden of proof, in the trial of an issue, upon one of the parties, such burden does not shift or change from one party to another during the progress of the trial, or as the weght of

*Cincinnati: Block & Co.

evidence alternates. In making such proof, there may be matters of fact upon which the party need offer no evidence, as the law will presume them, which gives the weight of evidence to such party as to such matters, and the other party will be bound to overcome such presumptions by evidence, or they will be held established by his adversary. But this pertains to the weighing of the evidence, and not to ascertaining upon whom the burden of proof rests.

THE INSURANCE LAW JOURNAL.*

Pleading—Insurable Interest of one having Incomplete Title.—Cone v. The Niagara Fire Ins. Co.; New York Court of Appeals, February 23rd, 1875. (4 Ins. L. J. 729). Opinion by Folger, J. 1. The policy provided that any interest not absolute or less than a perfect title, must be specifically represented. This clause was not specifically set up as a defence in the answer. There was a general denial of ownership and of insurable interest, and an allegation of insufficient facts to sustain an action specifying the particulars. There was no finding of fact or conclusion of law involving it. It nowhere appears in the case. *Held*, that the clause can not be set up as a defence on appeal. 2. The policy insured the interest of P., payable to C. C. was a judgment creditor of P., holding an incomplete title of the premises by virtue of sheriff's sale. The right of redemption belonged to P. when the policy was issued, but had ceased when the fire occurred. C. had agreed with P. if he obtained a full title, to have certain mortgage and judgment debts of P. satisfied. *Held*, that all this constituted an insurable interest in P., who had still the right, until after the fire, to create other judgment creditors who would have power to redeem. 3. The agent knew, when the policy was applied for, that the house was vacant and likely to remain so for some time. He also informed the company of the existing condition of the premises. *Held*, that the company is estopped from setting up that the policy is void for want of consent endorsed; and that C. is entitled to the amount of his policy, notwithstanding he may have obtained full indemnity elsewhere, free from any claims of the company to subrogation against P.; and that it was not necessary to make P. a party to the suit. C. would hold after recovery as trustee of P., for all in excess of his loans, and the company was only interested in ascertaining whether C. had such a claim as entitled him to sue.

Insurable Interest of Creditor in Estate of Deceased Debtor—Warranty—Company's Agent as Agent of Insured.—John Rohrback v. Germania Fire Ins. Co.; New York Court of Appeals, May 20th, 1875. Opinion by Folger, J. [4 Ins. L. J. 737.] 1. A creditor of the estate of one deceased, whose personal property left is insufficient for the payment of his debts, has an insurable interest in the sole real estate of the deceased debtor, when it is plain that if it is damaged by fire a pecuniary loss must ensue to the creditors thereby. The policy insured plaintiff on his "two buildings." *Held*, this was merely descriptive, and not a warranty of ownership or a material misrepresentation. 2. The policy provided that any interest less than absolute ownership should be expressed in the policy, and the interest truly stated, or the policy should be void. The nature of the insured's interest was not expressed in the policy. The policy made the application a warranty. The application stated that plaintiff had disclosed all the facts. In answer to the question as to the nature and amount of his interest, he replied, "his deceased wife held the deed," which was true, but the interest of insured was as general creditor of the estate. *Held*, that this was a breach of the warranty which avoided the policy. 3. The facts were truly represented to the agent who filled up the application, but the policy agreed that the agent should be considered the agent of the insured, and not of the company, under any circumstances *Held*, that the agreement must be enforced, and the company can not be concluded as to forfeiture by the knowledge of the agent.

Representation—Condition Subsequent.—Rohrbach v. The Ætna Ins. Co. New York Court of Appeals, May 25th, 1875. Opinion by Folger, J. [4 Ins. L. J. 749] 1. Where plaintiff made no representation as to his interest further than to show agent the instrument by virtue of which he claimed an interest: *Held*, that a policy phrase, "on his two buildings," even if more than a mere description, was not a phrase for which the insured was in any way responsible. 2. The policy provided that the claimant for a loss should give notice and render an account stating the ownership of the property insured. Plaintiff stated that the property belonged to him as legal heir of his deceased wife. His claim was that of general creditor of her estate. *Held*, that this was no intentional deception, or any calculated to mislead.

Barratry—A Question for the Jury.—Atkinson v. The Great Western Ins. Co. Commission of Appeals of New York. Opinion by Dwight, C. [4 Ins. L. J. 751.] Mere negligence or a wrongful act innocently done will not constitute barratry. The act must be wrong in itself, and willfully and intentionally done. It is not necessary that there should be a fraudulent intention to injure the owner. It is sufficient that there is a deliberate and palpable breach of duty toward the owner. The policy insured against the "barratry of the masters and mariners," upon cotton from the interior of Georgia to Great Britian. The bill of lading required the cotton to be carried below deck. The master, without knowledge of the owner, and against the remonstrance of the shipowner's agent, who warned him of the consequences, stowed a portion on deck. *Held*, that the action of the captain was in itself wrongful, and if wrongfully intended was barratry, and the whole question whether the act amounted to barratry should have been referred to the jury as a question of mixed law and fact

Removal to U. S. Court—Endorsement of other Insurance.—Pechner v. Phœnix Ins. Co. Commission of Appeals, N. Y., May 1875; opinion by Dwight, C. [4 Ins. L. J. 782.] 1. A petition for removal to the United States court simply alleged that the defendant was a citizen of Connecticut and the plaintiff a citizen of New York, but did not assert that at the time of commencing the action they were citizens of the respective states. *Held*, that there must be an allegation of citizenship at the time of commencing the action, and the averment is therefore fatally defective. 2. The policy provided that it should be void in case of other insurance without written consent endorsed. *Held*, that an agent having power to endorse consent could, by express words or implication, give oral consent that would be a valid waiver of the required condition; and that the power of a general agent to receive notice of other insurance, to endorse consent, and issue policies, includes the power to waive strict compliance with the terms of the contract.

*New York: C. C. Hine.

NATIONAL BANKRUPTCY REGISTER.*

Note—Rent.—*In re* Browne and Ten Eyck; United States District Court, New Jersey. Opinion by Noxon, J. [12 Nat. Bank. Reg. 529.] 1. If a note taken for rent is not paid at maturity, the landlord is entitled to all his remedies for the security or collection of his claim, in the same manner as if the note had never been given. 2. If a tenant makes an assignment for the benefit of his creditors to a trustee who sells the goods on the premises after the commencement of the proceedings in bankruptcy, and turns the proceeds over to the assignee, the landlord is entitled to payment of the rent out of the proceeds.

Attaching Creditor—Consanguinity—Fraud—Assignment.—*In re* S. Mendelsohn; United States District Court, California. Opinion by Hillyer, J. [12 Nat. Bank. Reg. 533.] 1. An attaching creditor may intervene and oppose an adjudication in involuntary bankruptcy. 2. The fact that the petitioning creditor and the debtor are brothers, warrants the court in scrutinizing the claim closely, but not in inferring fraud from it alone. 3. The omission to place a claim upon a list of creditors is merely a circumstance of suspicion. 4. An assignment is an act of bankruptcy, although it is so defective that it is void under the state laws.

Statute of Limitations.—*In re* M. Eldridge & Co. United States District Court, Virginia. Opinion by Hughes, J. [12 Nat. Bank. Reg. 540.] 1. The statute of limitations ceases to run against the creditor of a bankrupt at the commencement of the proceedings in bankruptcy, and, if not barred at that time, his claim may be proved afterwards, though at the time of proof it would be otherwise barred. 2. The effect in bankruptcy of the petition, the adjudication, and the assignment, is to vest the assets in the assignee as a trust, against which the statute of limitations ceases to run. 3. The filing of the petition by a bankrupt and his including the claim of a creditor in the schedule of debts, is equivalent to a new promise, so as to prevent the claim, if not already barred, from being defeated by the statute of limitations. 4. A court of bankruptcy, like a court of equity, will respect state statutes of limitation, and apply them in cases in which they are properly applicable. 5. The proof of claim in bankruptcy is not a *suit*, the commencement of which is *per se* necessary to suspend the running of the statute of limitations.

NEW YORK WEEKLY DIGEST.

Criminal Law—Riot—Nuisance—Obstruction of Streets.—State v. Hughs; Supreme Court of North Carolina. Opinion by Bynum, J. [72 N. Car. 25; S. C. 1 N. Y. Week. Dig. 170.] The facts found by the jury were these: "That the defendants and others assembled in the town to celebrate the emancipation proclamation, and with two drums and fifes, marched up and down the streets for two or three hours. Some were mounted, but being told to dismount, they got down and hitched their horses. When told by the mayor to desist, they at first refused, but being notified by the constable to stop, the defendant, Hughs, with the procession, beating the drum, went to the mayor's to make up a case to be tried before a magistrate, to test the mayor's right to forbid the procession. There were no arms in the crowd except the sabres used by the officers. No violence, in word or deed, was offered to any citizen. Some of the citizens were disturbed by the noise of the drums and some of the persons were drinking. The streets were obstructed from time to time during the interval, and one horse hitched in a lot, broke loose."

*New York: McDivitt, Campbell & Co.

Held, 1. As to the riot—this was not an unlawful assembly—it is a constituent and necessary part of the offense of *riot* that the assembly shall be unlawful.

2. As to the nuisance of the noise of the drums, the fifes and the shouting—"to constitute these things a nuisance, they must cause such an inconvenience and disturbance that the whole community will be annoyed, and, to show this, the exceptional facts and circumstances which made these acts otherwise innocent, a crime, must be set forth particularly, so that the court can see that, from their very nature, if proved, they are a nuisance to the whole community."

3. As to the obstruction of the streets—if the procession was lawful and the obstruction incidental and without any intention to hinder or permit travel or business, it was not indictable.

"In popular governments the laws allow great latitude to all public demonstrations, political, social or moral; and if the acts found by the jury are to be construed to be indictable, the doctrine of riots and nuisances would be extended far beyond the limits heretofore circumscribing them, and would put an end to all public celebrations, how innocent and commendable the purpose."

Maritime Lien—Sheriff.—Campbell v. Sherman; Supreme Court of Wisconsin. Opinion by Cole. J. [35 Wisc. 103; s. c. 1 N. Y. Week. Dig. 174]. A sheriff seized a steamboat, with her tackle and furniture, under warrant of attachment of a state court, issued by virtue of an act of the legislature of the state. The attachment was vacated and set aside. *Held*, 1. That there is no authority in the state to give a proceeding *in rem* against a vessel for the enforcement of a maritime contract. The act of the legislature was unconstitutional. 2. The process being void on its face, it is no protection to the officer; he can not excuse his ignorance of the law. He would not have been liable for refusing to execute a void process, and he could have protected himself by a bond of indemnity.

Inn-keeper.—Jalie v. Cardinal; same court. Opinion by Dixon, C. J. [35 Wisc. 118; s. c. 1 N. Y. Wk. Dig. 175.] The plaintiff went to the public house kept by the defendants and asked them whether they took boarders, and at what price. He was told $4.50 a week. He said he would come, and he paid his board by the week. One day, after drinking, he was asleep in his room, having left the door unfastened, when he was robbed of $175 which he had in his pocket. *Held*, 1. That there was nothing to show that the plaintiff was a boarder only. He was a traveler, and the duration of his sojourn would not deprive him of that character. 2. That the liability of defendants as inn-keepers is excused only by a loss caused by the act of God, or the public enemy, the misconduct of the guest, his servants, or companions whom he brought with him. 3. That the custody of the guest and of his property is the custody of the inn-keeper. 4. A want of ordinary care on the part of the guest will relieve the inn-keeper. 5. The denial of a new trial on the ground of newly discovered evidence was not an abuse of the discretion of the court. Such motions are received with great caution, and are regarded with suspicion and disfavor. The presumption of intentional omission and unpardonable negligence in not discovering the evidence in time for the trial must be fairly rebutted before the new trial will be granted.

Legal News and Notes.

—We have received the form of a tax-deed, prepared by Judge Emerson, of Ironton, Missouri, with a view to avoid all the objections heretofore suggested by the supreme court. The work has been carefully and excellently done, and the form will no doubt well serve the purpose desired.

—It would appear that jurymen sometimes make advances, looking toward bribery, as well as receive them. During the trial of an important case in the United States Circuit Court, in Chicago, a party in interest, by his affidavit, exposed J. A. Fergurson, a juror, in his attempts to "levy contributions." The juryman was summarily discharged, fined, and sent to jail for contempt.

—In the very important copyright case of Lawrence v. Dana, in which W. B. Lawrence claimed an infringement by R. H. Dana, Jr., of the copyright in "Lawrence's Notes to Wheaton's International Law," Judge Clifford, of the United States Supreme Court, has rendered a very important decision. It rules, in effect, that the author's notes to the work of another writer can not be used or abridged without an infringement of copyright.

—Temporary Marriage.—James Potts, a Justice of the peace of Jackson, Mich., has opened a wide door to the disenthrallment of woman and the happiness of man, In his capacity of civil officer, he has bluntly ignored the spiritual sentiment, "What God hath joined together let no man put asunder." He simply recognized that marriage is a civil contract, and nothing further, and married Mr. Allen A. Angel and Mrs. Elizabeth Hunt for as long as they could agree and be happy in each other's company. They made their own contract, signed it, and the proper officer ratified it, and pronounced the couple lawful man and wife. The marriage document is as follows:

"Jackson, Mich., Oct., 12., 1875.—We, Allen A. Angel and Mrs. Elizabeth Hunt, of the city of Jackson, Mich., do protest against the old and barbarous system of marriages, as it holds woman in subjection to man, and requires woman to surrender her individuality; also requires persons entering into the marriage relations to agree to do that which they can not possibly know they can perform. But, as society requires of those who enter into the marriage relation an acknowledgement of existing laws, we therefore submit to the behests of the law so far as to make our union legal, that we may avoid all unnecessary annoyance. If the union and harmony that now exists between us should continue through our natural lives, then this contract is to remain in force; otherwise to be null and void. A. A. Angel.
E. Hunt."

The only service was: "Do you, Mr. Angel, and do you, Mrs. Hunt, still, adhere to the above marriage contract, and are these your sentiments?" They adhered, and those were their sentiments. "This being your minds at the present time, I therefore pronounce you married. Subscribed," etc. And those two went their way feeling married in the flesh, and yet free in spirit like independent man and woman. There were four witnesses to the contract two men and their wives, probably, as they all bore the family name of Stone.

—The trial of W. O. Avery in the United States District Court, in this city, came to a conclusion last Friday. Three of the four counts in his indictment were cut out, but the fourth was submitted to the jury, and on this he was convicted. Illness prevented Judge Krum from making as able an effort for the defence as he otherwise would have done; while Ex-Senator Henderson won high encomiums by his brilliant and forcible argument for the government. A motion for new trial has been made, and Avery is at large on his bond. In Milwaukee, Weimer and Taft have been found guilty, and Rindskopf has been sent to jail for refusing to testify.

—The following is from Punch, and concerns Lord Brougham, of whom a rival is reported to have said, if he only knew a little law he would know a little of everything:—

"I wonder if Brougham thinks as much as he talks,"
Said a punster, perusing a trial;
"I vow, since his lordship was made Baron Vaux,
He's been *vox et præterea nihil!*"

Concerning the object of this quatrain, a good story is told in the Scottish Law Magazine. In the beginning of this century, William Hall, overseer of a farm in Selkirkshire, Scotland, was leaning against the dyke of the farmyard, patriarch-like, meditating at evening tide, while a young gentleman came up to him, wished him a good evening, and observed that the country around looked beautiful. The two getting into conversation, Hall, after a few observations, asked him "Whaur he was gaun?" The stranger added that he intended going to Jedburgh. "And what business can ye ha't at Jeddart?" says Wull. "Oh," says the gentleman, "I am going to attend the circuit court, but my feet have failed me on the road;" and observing a pony in the farm-yard, he said, "There's a nice bit pony of yours—is it to sell?—would you like to part with it?" "I wadna care," says Wull, "but ma brither Geordie, he's the farmer, he'sat Selkirk the day; but if we could get a good price for't I daresay we micht part wi't." "What do you ask for it?" says the other. "Ma brither," quoth Wull, "says its a thing we h'e nae use far, and if we could get aught o' a wiselike price for't, would be as weel to let it gang." There were only two words to the bargain, the gentleman and Wull agreed, and the sale was completed without missive or sale note. "But," says the gentleman, "by the way, I can not pay you to-night; but if you have any hesitation about me, my name is Henry Brougham, and I refer you to the Earl of Buchan, or Mr. George Currie, of Greenhead, who will satisfy you." The residence of this nobleman and Henry's brother advocate, Mr. Currie, were in the neighborhood. On this reference, without making any enquiry, Wull immediately gave the gentleman the pony with the necessary trappings. Wull, being a man of extreme orderly habits, went early to bed, and soundly slept, without either nightmare or pony, and the next morning, when the business of the farm called him and Geordie together, says Wull to Geordie, "ye was unco late in comin' home last nicht; I selt the powny." "And wha did ye sell it to?" says Geordie. "Oh, to a young gentleman." "And what did ye get for't?" Wull having mentioned the price—"my faith," says Geordie," ye hae selt it well." "But," says Wull, "I didna get the siller." "Ye big idoit! ye didna gie awa' the powny without getting the siller for't? Wha was he?" "Oh, he call'd himsel' Henry Brougham; and he said, if I had ony jalousin' about him, that the Earl of Buchan, or George Currie, the advocate, the laird o' Greenhead, would say he was guid enough for the money. Oh, he was a very honest-looking lad; I could hae trusted onything in his hand." Geordie became very wroth, and for six weeks Wull's life became a burden, till at last the payment was made, and peace returned to Wull.